IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

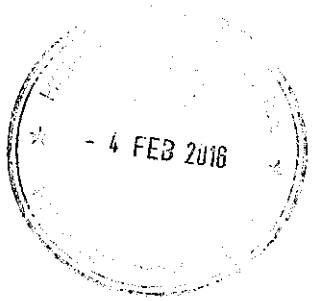
Mr Justice Blair

BETWEEN: **Claim No. 2015 Folio 213 (the "NZ Claim")**

(1) GUARDIANS OF NEW ZEALAND SUPERANNUATION AS MANAGER AND ADMINISTRATOR OF THE NEW ZEALAND SUPERANNUATION FUND
(2) ANDORRA GESTIÓ AGRICOL REIG, S.A.U. S.G.O.I.C.
(3) APWIA FUND SPC LTD
(4) OLIFANT FUND, LTD
(5) FYI LTD
(6) FFI FUND LTD
(7) ELLIOTT INTERNATIONAL, L.P.
(8) THE LIVERPOOL LIMITED PARTNERSHIP
(9) KARRICK LIMITED
(10) GL EUROPE LUXEMBOURG S.À R.L.
(11) SILVER POINT LUXEMBOURG PLATFORM S.À R.L.
(12) TDC PENSIONSKASSE **Claimants**

— and —

NOVO BANCO, S.A. **Defendant**



AND BETWEEN: **Claim No. 2015 Folio 215 (the "GSI Claim")**

GOLDMAN SACHS INTERNATIONAL **Claimant**

— and —

NOVO BANCO, S.A. **Defendant**

ORDER

UPON the application of the Claimant (in the GSI Claim) dated 17 December 2015 and the application of the Claimants (in the NZ Claim) dated 18 December 2015 ("**the Applications**")

AND UPON the Claimants in the NZ Claim and the GSI Claim (together "**the Claims**")

a) each undertaking that they will not at any time in the future seek to argue that in taking any step provided for in paragraphs 1, 2, 3 or 4 of this Order, the Defendant ("**Novo Banco**") has submitted to the jurisdiction of the English Court; and

b) each undertaking to indemnify Novo Banco in respect of any costs thrown away in taking such steps, should Novo Banco succeed in its appeal (the "**Jurisdiction Appeal**"), currently listed to be heard on 26-27 July 2016, against the decision of Mr Justice Hamblen of 7 August 2015 rejecting Novo Banco's challenge to the jurisdiction of the English Court in the Claims

AND UPON the Court recording that this Order is made without prejudice to the Jurisdiction Appeal and that Novo Banco shall not by taking any step provided for in paragraphs 1, 2, 3 or 4 of this Order below be submitting to the English Jurisdiction or entering any appearance in the Claims

IT IS ORDERED that:

1. Novo Banco shall by 4pm on 24 March 2016 serve on the Claimants in each Claim a draft Defence supported by a statement of truth. Such draft Defences:

    a. are to be compliant with and served in accordance with the rules relating to Statements of Case in the CPR and the Commercial Court Guide;

    b. shall not be filed, but are to be treated for all purposes as if they had been so filed, unless otherwise ordered.

2. The Claimants may thereafter by 4pm on 27 May 2016 serve draft Replies on Novo Banco, if so advised, supported by a statement of truth. Such draft Replies:

    a. are to be compliant with and served in accordance with the rules relating to Statements of Case in the CPR and the Commercial Court Guide;

b. shall not be filed, but are to be treated for all purposes as if they had been so filed, unless otherwise ordered.

3. Novo Banco shall have liberty to apply for an order pursuant to paragraphs 1b or 2b above restricting the use which may be made of the draft Defences or Replies.

4. Within 2 business days of any order dismissing the Jurisdiction Appeal, the parties are to attend the Clerk to the Commercial Court to fix a CMC on the next available date following expiry of the time for service of Acknowledgments of Service, time estimate half a day.

5. The draft Defences, and draft Replies, shall each be deemed served as Defences and Replies respectively upon filing by the Defendant of any second Acknowledgments of Service in accordance with the direction of Longmore LJ made on the 23 October 2015 following any order dismissing the Jurisdiction Appeal. Further:

   a. the Defendant will file with the Court its Defences at that time;

   b. the Claimants will file any respective Replies within 5 business days; and

   c. the Defences and any Replies so filed shall be in form of the draft Defences and any draft Replies served pursuant to paragraphs 1 and 2, except for any amendments allowed by the Court or by the consent of the parties.

6. If a second Acknowledgement of Service is filed in both the NZ Claim and the GSI Claim, then those claims are to be jointly case-managed and, pursuant to CPR 3.1(1)(h), tried on the same occasion.

7. Novo Banco shall not, in taking any step provided for in paragraphs 1, 2, 3 or 4 of this Order, be deemed to have submitted to the jurisdiction.

8. The costs of the Applications be costs in the Jurisdiction Appeal.

9. Liberty to apply.

Dated: 29 January 2016

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

2015 FOLIO 213

BETWEEN:

(1) GUARDIANS OF NEW ZEALAND SUPERANNUATION FUND AS MANAGERS AND ADMINISTRATOR OF THE NEW ZEALAND SUPERANNUATION FUNDS

(2) ANDORRA GESTIÓ AGRICOL REIG, S.A.U.S.G.O.I.C

(3) APWIA FUND SPC LTD

(4) OLIFANT FUND, LTD.

(5) FYI LTD.

(7) ELLIOT INTERNATIONAL, L.P

(8) THE LIVERPOOL LIMITED PARTNERSHIP

(9) KARRICK LIMITED

(10) GL EUROPE LUXEMBOURG S.A. R.L.

(11) SILVER POINT LUXEMBOURG PLATFORM S.A. R.L

(12) TDC PENSIONSKASSE

Claimants

- AND -

NOVO BANCO S.A.

Defendant

DRAFT DEFENCE

Definitions

1. The following definitions are adopted:

1.1 "Novo Banco" means Novo Banco S.A.

1.2 "GSI" means Goldman Sachs International.

1.3 "BES" means Banco Espirito Santo S.A.

1.4 "Oak Finance" means Oak Finance Luxembourg S.A.

1.5 The "EBRRD" means the Bank Recovery and Resolution Directive 2014/59/EU.

1.6 The "New Zealand Fund" means the Guardians of the New Zealand Superannuation Fund as managers and administrator of the New Zealand Superannuation Funds, the First Claimant in action 2015-213."

1.7 The "Oak Finance Facility" means a loan agreement expressed to be made between Oak Finance and BES as "Borrower" and dated 30 June 2014.

1.8 The "Oak Finance Liability" means the liability to make payment as "Borrower" under the Oak Finance Facility and associated obligations.

1.9 The "Portuguese Administrative Code" means the Portuguese Code of Administrative Procedure 1991 as amended from time to time and its successor the Portuguese Code of Administrative Procedure 2015.

1.10 The "Portuguese Banking Law" means Legal Framework of Credit Institutions and Financial Companies Decree-Law No. 298/92, of 31 December 1992, inserted and approved under Decree-Law 31-A/2012 of 10 February 2012 as amended from time to time.

1.11 The "Resolution Fund" means the public law legal body established in accordance with Title VIII-A of the Portuguese Banking Law to provide financial support for the application of resolution measures under that law.

1.12 The "Winding-Up Regulations" means the Credit Institutions (Reorganisation and Winding up) Regulations 2004/1045

2. Except as above or otherwise apparent, defined terms adopted in the Particulars of Claim are adopted below. References to paragraph numbers are, unless otherwise appears, references to paragraph numbers in the Particulars of Claim. Where a matter is not admitted below Novo Banco is unable to admit or deny it. Any allegation not specifically traversed is denied.

The Oak Finance Facility

3. The Oak Finance facility resulted from a proposal first made by GSI to BES in March 2014, in connection with the funding of facilities made available to a customer of BES. The original proposal (reflected in a written "Execution Strategy" prepared in March 2014) was that GSI would introduce funding of the order of US$835m, with the advance to be made by the vehicle company, with a guarantee in favour of the lender(s) to be provided by BES.

4. That proposal evolved. BES and Oak Finance entered into the Oak Finance Facility, by which BES undertook to repay an advance of $834,642,768. GSI arranged and underwrote the issue by Oak Finance of Notes with a nominal value of US$784,600,000. After deduction of fees and expenses US$730,312,422 was drawn down by BES under the Oak Finance Facility on 3 July 2014 (though actually paid through GSI). As pleaded below, GSI received a very large structuring fee, and the Oak Finance Facility provided for a further return, consistent with substantial risk.

5. It is Novo Banco's case that for the reasons below the Oak Finance Liability was, and has remained, a liability of BES, and does not fall upon Novo Banco, a bridge bank created in the circumstances and for the purposes pleaded below.

Creation and Status of Novo Banco

6. The EBRRD was introduced from July 2014. Its purpose included harmonisation of the procedures for "resolving" unsound or failing credit institutions and investment firms within the EU. To that end it provided for designated authorities in member states to undertake reorganisation measures in

relation to credit institutions established in their jurisdiction, and required member states to ensure that the measures taken by those authorities under their local law would be recognised and given consistent effect throughout the EU. The Directive was implemented into Portuguese law by the Portuguese Banking Law and (in material respects) into English law principally by amendment to the Winding-Up Regulations.

7. On 30 July 2014 BES announced a first half loss of €3.577bn, adversely affecting its required common equity tier 1 and tier 1 capital ratios. The Bank of Portugal intervened exercising its powers under the Portuguese Banking Law. The intervention in BES was (and was said by the Bank of Portugal to be) necessary due to the size and importance of BES to the Portuguese Financial System and the resultant systemic risk that it posed, including to retail depositors.

8. Accordingly:

8.1 Novo Banco was created by decision of the Bank of Portugal on the 3 August 2014, pursuant to the powers contained in Article 145 the Portuguese Banking Law as then in force. It was capitalised at $4.9bn from the Resolution Fund.

8.2 Novo Banco was created to assume certain of the assets and liabilities of BES for the purpose of achieving the "*Resolution Objectives*" identified in the EBRRD and the purposes identified in the Portuguese Banking Law, which include (i) ensuring the continued provision of essential financial services, (ii) protecting the systemic risk, (iii) safeguarding the interests of taxpayers and the public purse and (iv) safeguarding the confidence of depositors. The EBRRD provides that the "*regime should ensure that shareholders bear losses first and that creditors bear losses after shareholders, provided that no creditor incurs greater losses than it would have incurred if the institution had been wound up under normal insolvency proceedings..*".

8.3 The assets and liabilities so assumed by Novo Banco are those defined by the relevant decisions of the Bank of Portugal, as made and/or

amended and/or modified from time to time in accordance with that law, and with the general principles of Portuguese law identified (as relevant) below.

8.4 Novo Banco is a Bridge Institution within the meaning of the EBRRD.

8.5 Its creation constituted a "*Resolution Measure*" taken in relation to BES and within the meaning of the EBRRD.

Relevant Bank of Portugal Decisions

9. Exercising its powers in accordance with the law of Portugal under the Portuguese Banking Law, (and thereby acting as a Resolution Authority within the meaning of the EBRRD), the Bank of Portugal acting by its Board of Directors has made the following relevant decisions, (described more fully below, and to each of which Novo Banco will refer in full).

9.1 ***"the 3 August 2014 decision"***. The decision of 3 August 2014 made at 8.00pm, by which Novo Banco was created and the assets and liabilities to be transferred to it originally stated.

9.2 "***the 22 December 2014 decision***" by which the Bank of Portugal formally determined that the Oak Finance Liability had not been transferred to Novo Banco pursuant to the general terms of the 3 August 2014 decision, but remained a liability of BES.

9.3 "***the 11 February 2015 decision***" by which the Bank of Portugal affirmed the 22 December 2014 decision.

9.4 "***the 15 September 2015 re-transfer decision***" by which the Bank of Portugal expressly without prejudice to its earlier decisions (amongst other things) re-transferred to BES the Oak Finance Liability.

9.5 "***the 29 December 2015 clarification and re-transfer decision***" by which the Bank of Portugal made further and final amendments and clarifications to the terms of the 3 August 2014 decision (as amended).

9.6 "***the 29 December 2015 perimeter decision***" by which the Bank of Portugal, without prejudice to its earlier decisions, re-transferred to BES the Oak Finance Liability.

10. The Bank of Portugal, as well as acting as the Resolution Authority for the purposes of the EBRRD, was acting as an administrative authority as a matter of Portuguese law (as is envisaged and provided for by the language of the EBRRD). As such an authority and in accordance with Portuguese administrative law:

10.1 The Bank of Portugal had power to enact administrative decisions (administrative acts) establishing legal rights and obligations for third parties in specific situations; and,

10.2 Similarly, the Bank of Portugal had power in accordance with the provisions of the Portuguese Administrative Code, (a) to reform, ratify or convert its earlier administrative acts, or (b) to revoke, amend or replace such an act.

10.3 Subject to narrow categories of nullity, administrative acts are directly effective to define a party's rights or obligations unless or until annulled by the administrative courts of Portugal.

10.4 Each of the decisions identified below was a valid administrative act, has not been annulled in any such (or any) court, and was and is valid and binding upon BES, Novo Banco and Oak Finance and its successors.

11. The Claimants and GSI have brought proceedings in the Lisbon Administrative Court to annul the 22 December 2014 decision. Those proceedings remain pending. GSI has been unsuccessful at first instance, and on appeal, in seeking interim relief suspending that decision. Those parties have also brought proceedings in the same court to annul the 15 September re-transfer decision.

The 3 August 2014 decision

12. By the 3 August 2014 decision, the Bank of Portugal established Novo Banco as a bridge bank and stated the assets and liabilities to be transferred to it pursuant to the powers provided at Articles 145 G-H of the Portuguese Banking Law.

13. Article 145-H (2) of the Portuguese Banking Law, as amended with effect from 31 July 2014 prohibited the transfer to a bridge bank of "*all and any commitments assumed by the original credit institution towards: (a) The respective shareholders, whose holding was equal to or greater than 2% of the share capital at the time of the transfer, the natural or legal persons whose holding, in the two years before the transfer, was equal to or greater than 2% of the share capital, members of the management or supervisory boards, statutory auditors or auditing companies or persons of similar status in other companies which are in a dominant influence or group relationship with the institution;*" and "*(c) The spouse, relatives by consanguinity or by affinity in the first* degree *or third parties acting on behalf of the persons or entities referred to in the foregoing subparagraphs;*".

14. Accordingly, the 3 August 2014 decision specifically excluded, at Schedule 2, from the liabilities to be transferred to Novo Banco "*.. liabilities to (a) the respective shareholders, whose participation is equal to or higher than 2% of the share capital or to persons or entities which in the two-year period preceding the transfer held a participation equal to or higher than 2% of the capital of BES ..or (c) ... third parties acting on behalf of the persons or entities referred to in the foregoing subparagraphs.*"

15. Additionally, the 3 August 2014 decision provided that "*after the transfer (...), Banco de Portugal may at any time transfer or re-transmit assets, liabilities, off-balance-sheet items and assets under management between BES and Novo Banco, SA, in accordance with Article 145-H (5) of the Legal Framework*".

16. In fact, for the reasons set out in paragraphs 36-43 below,

    16.1 the Oak Finance Liability fell within the prohibition at Article 145 –H (2) of the Portuguese Banking Law and therefore within the exclusion

in Schedule 2 of the 3 August 2014 decision, and was not then or at any time transferred to Novo Banco.

16.2 Any transfer to Novo Banco of the Oak Finance Liability would have been contrary to the Portuguese Banking Law set out above.

The 22 December 2014 decision

17. The Bank of Portugal decided in these terms:

"According to the conclusion of the analysis contained in Doc. No. NTI/2014/00003441, there are serious and well-grounded reasons to justify the conviction that Oak Finance acted in the granting of this financing on behalf of Goldman Sachs International, an entity regarding which there also exist serious and well-grounded reasons to believe that it is included in Art. 145-H(2)(a) of the RGICSF:

Therefore the transfer of the liability of Banco Espirito Santo to Oak Finance cannot be allowed, seeing the serious risk of allowing an irreparable violation of the provisions of Point 1(b)(i) of Annex 2 of the resolution of the Board of Directors of the Bank of Portugal of 3 August 2014 (8:00 p.m.) as worded in the resolution of the same Board of Directors on 11 August 2014 (5:00 p.m.) and the provisions of Art. 145-H(2)(c) of the RGICSF

Pursuant to the provisions of Art. 145 G(1) and Art. 145-H(2)(c) of the RGICSF, and based on the grounds contained in Doc. No. NTI/2014/00003441, the Board of Directors of the Bank of Portugal resolves the following:

a) The liability of Banco Espirito Santo to Oak Finance resulting from the financing contract of 30 June 2014, was not transferred to Novo Banco;

b) This ruling is effective as from 3 August 2014;

c) Novo Banco and Banco Espirito Santo are to adjust their accounting records to this resolution and act in accordance with what is ordered herein.

Novo Banco, Banco Espirito Santo and Oak Finance are to be notified of this decision."

18. The 22 December 2014 decision:

18.1 constituted a continuing exercise by the Bank of Portugal of its powers as an administrative authority to determine under the Portuguese Banking Law the status of the Oak Finance Facility in accordance with the powers summarised at paragraph 10 above;

18.2 was in substance a direction to re-transfer to the books of BES the Oak Finance Liability (and so a "*transfer*" within the meaning of the EBRRD);

18.3 was a binding administrative act under Portuguese Banking law with equivalent legal standing to the 3 August 2014 decision; and

18.4 was and is binding upon the parties to whom it was addressed namely, materially BES, Novo Banco, Oak Finance and its successors.

19. In those circumstances, as a matter of Portuguese law the 3 August 2014 decision was and is effective only subject to and in light of the terms of the 22 December 2014 decision and subsequent modifications.

The 11 February 2015 decision

20. The 11 February 2015 decision by the Bank of Portugal was made in response to detailed written representations made by GSI (said to be on behalf of Oak Finance) challenging the effect of the 22 December 2014 decision.

21. Notwithstanding those representations, for the reasons appearing from the recitals (and in the circumstances recorded in the attached memorandum IFI/2015/00000510), the Bank of Portugal recorded that "*the Board of Directors decided to confirm and maintain its decision of 22 December 2014.*"

22. The 11 February 2015 decision was again an administrative act, confirming the decision of 22 December 2014, and remains effective under Portuguese law unless and until annulled by the Portuguese Administrative Courts.

The 15 September 2015 re-transfer decision

23. The decision was made under the amended terms of the Portuguese Banking Law, in particular articles 145(Q) and 146. Its operative terms are as follows:

"Bank of Portugal, in exercise of its powers under Articles 66 and 40 (6) and (7) of the EBRRD and the currently applicable Articles 145-Q(1)(3)(4) and (5) and 146(1) of the RGICSF, and of all its other powers in that behalf, hereby:

1.1 Once more determines and confirms (for the reasons explained in Bank of Portugal's resolutions of 22 December 2014 and 11 February 2015) that the Oak Finance Liability did not in fact fall within the classes of the transferred liabilities as specified in Bank of Portugal's resolution of 3 August 2014;

1.2 Without prejudice to that determination and confirmation, determines that it is in any event necessary in order to achieve the resolution objectives laid down in Article 31 of the EBRRD as implemented in Article 145-C of the RGICSF that the Oak Finance Liability:

1.2.1 Should for all purposes remain (and be regarded as having remained) with BES and should not pass (or be treated as having passed) at any point to Novo Banco; and

1.2.2 To such extent as may be necessary in order to achieve that end and to have that result recognised in the United Kingdom and in all other Member States of the European Union, should for the avoidance of doubt now formally be transferred back by Bank of Portugal from Novo Banco to BES.

Accordingly:

2.1 If and to the extent that the Oak Finance Liability:

2.1.1 Was (despite the determination to the contrary contained in Bank of Portugal's resolution of 22 December 2014, as confirmed by Bank of Portugal's resolution of 11 February 2015) transferred by Bank of Portugal's resolution of 3 August 2014 from BES to Novo Banco; and

2.1.2 Was not transferred back to BES by Bank of Portugal's resolution of 22 December 2014;

(as the English Court indicated its 7 August 2015 judgment was that Court's provisional view) so that a formal transfer back may now be required in order to ensure that the Oak Finance liability is recognised in the United Kingdom as having remained with or as now returning to BES and that that position is clear in all Member States of the European Union;

2.2 And in order therefore to guarantee the uniformity of the application of the resolution measure in all the Member States of the European Union, and the respect for the mutual recognition principle;

2.3 And in order to achieve the resolution objectives laid down in Article 31 of the EBRRD as implemented in Article 145-C;

Bank of Portugal

2.4 For the avoidance of doubt, once more, and in the exercise of its powers under Articles 66 and 40(6) and (7) of the EBRRD and the currently applicable Articles 145-Q(1) (4)(c) and (5) and 146(1) of the RGICSF and of all its other powers in that behalf, hereby adopts a resolution measure for the purposes of EBRRD, and/or a reorganization measure in the context of the Directive 2001/24/EC, by which it transfers the Oak Finance Liability back from Novo Banco to BES.

3. This transfer comprises all the associated liabilities, interests and potential cross-default liabilities, and is effective from 3 August 2014.

4. Novo Banco and BES are instructed to ensure that this resolution is fully applied on their accounting records, and to act in accordance with what is ordered herein."

24. The decision was an administrative act, made pursuant to the Portuguese Banking Law and valid as such under Portuguese law. Its effect was:

24.1 First, again (and with the same basis and authority as the preceding decisions) to confirm and determine that the Oak Finance liability had not been transferred to Novo Banco, and in addition,

24.2 Expressly in order to ensure there be no doubt about the effect of the decision as a matter of EU law under the EBRRD and in all EU countries, to re-transfer the Oak Finance Liability to BES with effect from the 3 August 2014.

The 29 December 2015 clarification and re-transfer decision

25. For the reasons and purposes appearing in its recitals, and in particular to ensure uniform treatment of many alleged liabilities of and/or claims against Novo Banco including (but not only) the Oak Finance Liability, the Bank of Portugal resolved that:

25.1 "*B) In particular, it is hereby clarified that the following liabilities of BES were not transferred from BES to Novo Banco: ...(vii) Any liability which is the subject of any proceedings set out in Annex I*". These proceedings were identified in that Annex.

25.2 "*C) To the extent that notwithstanding the foregoing clarifications, any liabilities of BES which under the terms of any of the*

paragraphs above and the Decision of 3 August were to remain in BES but were in fact transferred to Novo Banco, those liabilities are hereby re-transferred from Novo Banco to BES with effect from 8.00 p.m. on 3 August 2014."

26. The decision was an administrative act, made pursuant to the Portuguese Banking Law, and valid as such under Portuguese law. Its effect was (again) to confirm that as a matter of such law the Oak Finance liability had not been transferred to Novo Banco, or alternatively that it be re-transferred with effect from the 3 August 2014 decision.

The 29 December 2015 perimeter decision

27. The recital to the decision record that:

"8. Without prejudice to the decisions of the Board of Directors of Banco de Portugal of 22 December 2014, of 11 February 2015 and of 15 September 2015, all pertaining to the "Oak Finance Liability" (as defined in the decision of 15 September 2015), Banco de Portugal must additionally determine that, as it is a liability similar in nature to bonds, targeting and subscribed by qualified investor(s), that liability (and all associated liabilities) must remain in BES, and thus, should a decision transited in res judicata determine that the Oak Finance Liability is not covered by paragraph 1(b)(i)(c) of Annex 2 of the Decision of 3 August, or determine that liability belongs to Novo Banco, that liability (and all associated liabilities) is re-transferred to BES.

9. Notwithstanding the clarifications and amendments contained in this decision, to the extent that an asset or liability has been transferred to Novo Banco which should have remained in BES or remains in BES but which should have been transferred to Novo Banco, the Re-transfer Power is exercised to effect the clarifications and amendments contained in this decision."

28. Operatively, the decision provided amongst other things that:

"F) A new Annex 2C is added to the Decision of 3 August, with the wording of the decision on "Clarification and re-transfer of liabilities and contingencies defined as excluded liabilities in paragraph 1(b)(v) through (vii) of Annex 2 of Banco de Portugal's Decision of 3 August 2014 (8:00 p.m.), as reworded by Banco de Portugal's Decision of 11 August 2014 (5:00 p.m.)", adopted on this date by the Board of Directors of Banco de Portugal;

G) Without prejudice to the decisions of the Board of Directors of Banco de Portugal of 22 December 2014, of 11 February 2015 and of 15 September 2015, all pertaining to the "Oak Finance Liability" (as defined in the decision of 15 September 2015), Banco de Portugal additionally determine that, as it is a liability similar in nature to bonds, targeting and subscribed by qualified investor(s), that liability (and all associated liabilities) must remain in BES, and thus, should a decision transited in res judicata determine that the Oak Finance Liability is not covered by paragraph 1(b)(i)(c) of Annex 2 of the Decision of 3 August, or determine that the liability belongs to Novo Banco, that liability (and all associated liabilities) is re-transferred to BES.

H) Subparagraph (ix) is added to paragraph 1(b) of Annex 2, which shall read as follows:

"The Oak Finance Liability".

...

J) To the extent that any assets, liabilities or off-balance sheet items which under the terms of the foregoing paragraphs were to remain in BES but that, in fact, were transferred to Novo Banco, those assets, liabilities or off-balance sheet items are hereby re-transferred from Novo Banco to BES with effect from 8 p.m. on 3 August 2014;"

29. The effect of the decision was therefore (without prejudice to the earlier decisions) to re-transfer from Novo Banco to BES any liability under the Oak Finance Facility which (contrary to the earlier decisions) had been transferred to Novo Banco. The intent was to ensure that the Oak Finance Liability was treated in the same manner as liabilities to institutional bondholders, which were re-transferred to BES by a further decision adjusting the perimeter of Novo Banco's assets on that date.

30. Accordingly, as a matter of Portuguese law, the decisions of the Bank of Portugal constitute a reorganisation measure (or series of such measures) the effect of which is conclusively to determine (under such law) that the Oak Finance Facility is not, and has never been, a liability of Novo Banco and/or alternatively that it was re-transferred with effect from 3 August 2014.

Status of the Bank of Portugal Decisions under EU and in English Law

31. The position resulting in Portugal under the Portuguese Banking Law from those decisions, alternatively each of them, and in particular the binding

determination of the status of the Oak Finance Liability as a liability of BES rather than Novo Banco:

31.1 Constituted the application by a Resolution Authority of a "*resolution tool*" and/or the exercise of a "*resolution power*" within the meaning of the EBRRD;

31.2 Accordingly, constituted a "*reorganisation measure*" within the terms of Article 2 of the Reorganisation and Winding-up Directive 2001/24/EC as amended with effect from 2 July 2014 by Article 117 of the EBRRD; and

31.3 Was a "*directive reorganisation measure*" having "*effect in relation to an EEA credit institution by virtue of the law of the relevant EEA State*", (that is Portuguese law); and

31.4 Was therefore an "*EEA Insolvency measure*" within the terms of Regulation 2 of the Winding-Up Regulations; and

31.5 Was therefore at all times directly effective in English law by virtue of Regulation 5 of the Winding-Up Regulations.

32. The Winding-Up Regulations were amended with effect from 10 January 2015 by the Bank Recovery and Resolution (No 2) Order 2014 SI 2014/3348, so as to expand the definition of an EEA Insolvency Measure to include and "*or any other measure to be given effect in or under the law of the United Kingdom pursuant to Article 66 of the EBRRD*". Article 66 requires that member states other than that of the Resolution Authority give effect under their law to (amongst other things) a transfer of a liability. There was not at that, or any date, under Portuguese law or by virtue of any reorganisation measure of the Bank of Portugal any transfer to Novo Banco of the Oak Finance Liability.

33. Further or alternatively the decisions of the Bank of Portugal subsequent to the 3 August 2014 decision are for those purposes equally a "*transfer*". It is the cumulative effect of them (and the consequent non-transfer, or retransfer, of the Oak Finance Liability) which falls to be given effect by virtue of Article 66, and

in turn take effect in English law under the Winding-Up Regulations as so amended.

34. Accordingly as a matter of English law, and pursuant to the express terms of the 22 December 2014 decision and/or the 11 February 2015 decision, and/or the 15 September 2015 re-transfer decision and/or the 29 December 2015 clarification and re-transfer decision:

34.1 Novo Banco is not a party to the Oak Finance Facility;

34.2 Novo Banco has not at any time been a party to the Oak Finance Facility; and

34.3 BES is and was at all times the Borrower under the Oak Finance Facility, and the party liable to make payment of any Oak Finance Liability or liable for any breach of that facility.

35. Further or alternatively, pursuant to the 29 December 2015 perimeter decision, (or in the further alternative the other decisions identified above) Novo Banco ceased to be a party to the Oak Finance Facility, and BES again became, party to and the Borrower under the Oak Finance Facility and liable to make any payment of the Oak Finance Liability or to pay damages for any breach of the Oak Finance Facility.

Oak Finance Liability an Excluded Liability in any event

36. Further and in any event, (and irrespective of the fact, status or effect of the 22 December 2014 decision, the February 2015 decision, the 15 September 2015 re-transfer decision or the 29 December 2015 clarification and re-transfer decision), the Oak Finance Facility (and Oak Finance Liability) (i) was not within the liabilities transferred from BES to Novo Banco by the 3 August 2014 decision, and (ii) was a liability which it was or would have been contrary to the terms of Article 145-H of the Portuguese Banking law so to transfer, because as a matter of Portuguese law:

36.1 Oak Finance was acting "*on behalf of*" GSI within the meaning of Article 145-H(2)(c); and

36.2 GSI had, in the 2 year period prior to the 3 August 2014, held (and disclosed to the members that it held) an interest in the shares of BES equal to or greater than 2% of the share capital within the terms of A145-H(2)(a).

(A) "Acting on behalf of..."

37. As a matter of general Portuguese law, and for the purposes of Article 145-H (2) (c), a transaction is concluded or act performed "*on behalf of*" (which can also be translated as "*for the account of*") a party if the effects of the transaction or act are to be transferred to or reflected in their economic substance upon that party. No agency whether formal or informal is required, nor is a relationship equivalent to trusteeship under English law required. No "*piercing of the corporate veil*" is necessary. Nor does it require any fraudulent intention or device, or require that the legal structure be disregarded or be in any way invalid or illegal. There is no exact English law analogy.

38. Novo Banco relies on the following:

38.1 The Oak Finance Facility was proposed, negotiated, arranged and established by GSI dealing with BES.

38.2 Similarly GSI proposed and arranged the financing structure, caused to be established Oak Finance, organised, and bore the operational costs and expenses of Oak Finance, arranged the issue of the Notes and acted as underwriter upon that issue pursuant to clause 4 of the Drawdown Deed. GSI acted formally as dealer, arranger, calculation agent, disposal agent and process agent and will have instructed professionals accordingly.

38.3 GSI's original proposal to BES made in March 2014 envisaged that GSI would provide the funding to a special purpose vehicle which in turn would advance funds to BES, consistent with GSI retaining economic interest in the repayment of the loan. Despite the change in structure (for which pending disclosure Novo Banco does not know the

reason) GSI retained at least a substantial economic interest in and exposure to the loan as explained below.

38.4 GSI derived a very substantial fee from the transaction, described as "*structuring fee*" and exceeding $54m (or 6.5% of the Note issuance), which was paid by BES by deduction from the advance actually made to them pursuant to a Fee Letter dated 30 June 2014. That sum was (as expressly acknowledged in the Prospectus) "*materially higher than the fees and/or commissions typically charged*" for arranging financing of this nature and consistent with substantial risk.

38.5 The sums paid to BES under the Oak Finance Facility were in fact (as GSI plead) paid directly by order of GSI (and not, as envisaged in clause 7.2 of the Drawdown Deed).

39. Accordingly, for the purposes of the Portuguese Banking Law and the 3 August 2014 decision, and despite its independent legal personality or the structure of the finance arrangement, Oak Finance was, as a matter of Portuguese law, acting "*on behalf of*" GSI because:

39.1 Oak Finance itself was merely a vehicle, having no independent economic interest or role in the transaction, and no continuing role in the Oak Finance Facility following default and the assignment of rights to the Noteholders.

39.2 The only material asset of Oak Finance was the Oak Finance Liability. That asset was entirely charged to the Noteholders as security for the Notes issued by Oak Finance. Conversely, the value of and risk associated with the Notes were in substance the value and risk of the Oak Finance Facility and in turn the financial covenant of BES.

39.3 In economic terms the Oak Finance Liability was an asset the substance, benefit or risk of which was held "*on behalf of*" those holding the Notes, or in turn those persons exposed to the economic substance of the benefit and risk of the Notes.

40. The economic substance of the benefit and risk of the Notes (and so the substance of the loan made pursuant to the Oak Finance Facility) fell at least substantially upon GSI. Pending disclosure as to GSI's financial exposure, Novo Banco can provide the following particulars:

40.1 As demonstrated by these proceedings GSI came to have an interest in the Notes and thereby the Oak Finance Liability to the extent of (at least) 26.6% or $222m. For the reasons set out below Novo Banco believes GSI's economic interest to have been substantially greater.

40.2 GSI has asserted in proceedings before the Lisbon Administrative Court that it had an economic exposure as a result of its "*market-making function in hedging noteholders' credit risks*".

40.3 On 3 July 2014 GSI entered into Total Return Swaps with NBAD Financial Markets (Cayman) Limited by which it assumed the risk upon $334m Class A1 Notes and $60m Class A2 Notes issued by Oak Finance. It retained at least $189m of exposure under those swaps on 3 August 2014. GSI entered into further Total Return Swaps with Commerzbank AG ($140m on 3 October 2014) and the NZ Fund ($60m on 8 October 2014).

40.4 GSI's conduct has been consistent with it having at least such an exposure:

40.4.1 By its letter of 7 August 2014 to the Bank of Portugal (now relied on by GSI to relate to the Oak Finance Facility, though it did not say so in terms at the time) GSI enquired about the fate of "*unsubordinated debt obligations …held by Goldman Sachs Group Entities*".

40.4.2 Despite having no relevant formal role in the Oak Finance Facility, GSI approached the Bank of Portugal to contest the 22 December 2014 decision

40.4.3 On 3 October 2014 Jonathan Donne and Antonio Esteves of GSI provided to Novo Banco detailed proposals (which were

not proceeded with) for Novo Banco to pre-pay the Oak Finance Facility and issue its own notes in substitution for those issued by Oak Finance.

40.5 GSI sold to the NZ Fund credit protection against default by BES. Pending disclosure the best particulars Novo Banco can provide are that the NZ Fund has stated in documents dated 19 February 2015 and 28 October 2015 published on its website that it purchased from "Goldman Sachs" "credit protection insurance" (which Novo Banco believes to have been in the form of Credit Default Swaps) relating to BES senior debt obligations (including the Oak Finance Liability) at the date of the advance by Oak Finance to BES.

40.6 GSI has stated in its Portuguese proceedings that it arranges hedges for investors, including "*subscribers in securitisation vehicles it arranges.*"

40.7 Pending disclosure, Novo Banco infers from the above that GSI may have entered into similar arrangements with other subscribers for or purchasers of the Notes.

40.8 GSI underwrote the Notes pursuant to its obligations at clause 4 of the Drawdown Deed

(B) "... participation equal to or higher than 2% of the share capital of BES"

41. As a matter of Portuguese law, and upon its proper construction, Article 145-H (2) by its reference to "*shareholders*" and "*holding*" of the "*share capital*" includes (a) actual direct, and indirect, shareholders, for which purposes group holdings are aggregated; (b) holders of rights including rights to acquire shares or voting rights; and (c) parties holding positions giving rise to an economic interest in the shares under, for example, cash settled swap or similar derivative contracts. In support of that construction, Novo Banco will rely, amongst other matters, upon the terms of Article 20 of the Portuguese Securities Code read with Article 13-A of the Portuguese Banking Law, and Article 2-A of

Regulation 5/2008 as amended by Regulation 5/2010 of the Portuguese Securities Commission.

42. For those purposes, GSI had in the period of 2 years prior to 3 August 2014 held an interest in the shares of BES equal to or exceeding 2% of the capital:

42.1 Goldman Sachs Group Inc made a disclosure to CMVM and to BES on 21 July 2014 under Article 12 of Directive 2004/109/EC and Article 11 of Directive 2007/14/EC, stating that it had crossed the threshold of 2% of the share capital of BES.

42.2 That disclosure identified a group holding of 2.27% of BES rights, of which 2.05% was held by GSI. Of that 2.27%, 1.6% was said to be comprised of voting rights attaching to shares, and 0.67% corresponded to financial instruments by which shares and voting rights in BES might be acquired.

42.3 That disclosure was on standard form TR1, was of a "*qualified shareholding*", and was in a form consistent (only) with the holding by GSI of an interest in shares in BES or equivalent rights. The covering email similarly stated that Goldman Sachs Group Inc held more than 2% of the share capital of BES together with corresponding voting rights which "*resulted from acquisitions on 15th July 2014 of 127,665,987 shares by virtue of transactions conducted off the exchange*".

42.4 The effect of that communication was in turn disclosed by BES to the market on 22 July 2014, resulting in a 14.34% rise in the price of BES shares.

42.5 On 29 July 2014 Goldman Sachs Group Inc made a disclosure in similar terms, advising that it now held only 1.91% of the share capital and voting rights, comprising 1.25% shares and 0.66% financial instruments by which shares and voting rights might be acquired.

42.6 On 7 August 2014 GSI wrote to the Bank of Portugal enquiring as to the fate of obligations to "*Goldman Sachs group entities*" in light of

"*any shareholding and/or long synthetic position in BES above the 2% threshold that Goldman Sachs may have held in the last two years by virtue of its market-making and facilitation of client transactions.*"

42.7 GSI has subsequently contended, inconsistently with the terms of its disclosure to the market which remains uncorrected, that its notifications related to in part to rights under derivative contracts, namely cash settled swaps, by which they neither held nor stood to acquire the shares or voting rights. Upon a proper construction of the Portuguese Banking law, even such rights are to be included and aggregated for the purpose of Art 145-H (2).

43. Accordingly:

43.1 GSI held the shares and rights which it disclosed.

43.2 In any event the Bank of Portugal was entitled, and right, to conclude and act on the basis that GSI held in excess of 2% of the shares of BES.

43.3 GSI is estopped as a matter of policy from denying that it held the shares and rights it disclosed.

Response to the Particulars of Claim

44. Subject to production of relevant corporate documents paragraphs 1 to 12 of the Particulars of Claim will be, but are not presently admitted. Paragraph 13 is admitted.

45. No admissions are made to paragraph 14. Paragraphs 15 and 16 are admitted except that BES was not concerned with the notes programme. Paragraphs 17-19 are admitted.

46. Paragraphs 20-22 are admitted.

47. Paragraph 23 is not admitted.

48. Paragraph 24 is admitted. No admission is made of paragraph 25.

49. Paragraph 26 is admitted.

50. No admissions are made to paragraph 27.

51. Paragraph 28 is admitted.

52. The first sentence of Paragraph 29 is not admitted; the sums received by BES were transmitted by GSI. Otherwise that paragraph is admitted.

53. Save where not inconsistent as pleaded above, paragraphs 30-34 are admitted.

54. Paragraph 35 is denied, for the reasons appearing at paragraphs 9-30 and 36-43 above. Subject thereto the law set out in paragraph 36 is admitted.

55. Paragraph 37 is denied: the 3 August 2014 decision did not transfer the Oak Finance Facility or Liability to Novo Banco.

56. Paragraph 38 is admitted; further the 22 December 2014 decision did decide that the Oak Finance Liability was not transferred, and was effective from 3 August 2014.

57. Paragraph 39 is admitted. The content of the 22 December 2014 decision, set out at paragraph 40, is admitted and Novo Banco will refer to the decision in full.

58. Paragraph 41 is denied for the reasons appearing at paragraphs 36-43 above. Subject to that, sub-paragraphs (2)(a), (b), (c), and (e) are admitted. Sub-paragraph (2)(d) is not admitted.

59. Paragraph 42 is denied. The 22 December 2014 decision was effective in English law, as pleaded at paragraphs 31-35 above.

60. Paragraph 43 is denied:

60.1 The Oak Finance Liability had not been transferred for the reasons pleaded at paragraphs 36-43 above, and/or

60.2 The 22 December 2014 decision was, as a matter of Portuguese Administrative Law and as pleaded at paragraphs 10, 17-19 and 30

above, effective by its terms so that the Oak Finance Liability had not been transferred.

60.3 Sub-paragraphs (1) (2) and (3) are admitted, but,

60.3.1 Novo Banco's email of 14 August 2014 was written, and Novo Banco's accounting records prepared, in light of Novo Banco's understanding at that time that the Oak Finance Liability had been transferred.

60.3.2 The Bank of Portugal's email of 11 August 2014 did not make express reference to the Oak Finance Facility, and nor did the letter to which it was a response. Novo Banco does not know the circumstances in which it came to be written. In proceedings before the Portuguese Courts the Bank of Portugal has stated (and Novo Banco adopts this position) that Dr Machado (the author) had no authority to bind the Bank of Portugal or to exercise functions in the area of resolution, and his email simply recited the general position.

61. Paragraph 44 is admitted and Novo Banco will refer to the terms of the February 2015 decision. As pleaded at paragraph 10 above, under Portuguese law, the only competent court to determine such matters is the Portuguese Administrative Court.

62. Paragraph 45 is accordingly denied.

63. For the reasons above, it is denied that Novo Banco was liable to pay, or therefore "failed" to pay any instalment of the Oak Finance Liability, which remained at all times or alternatively was at the time it was due, a liability of BES. Otherwise, paragraph 46 is admitted.

64. The Assignment Agreements, but not the circumstances or effect of them, are admitted. No admission is made of the right or title to sue of any Claimant. Otherwise paragraphs 47-49 are admitted.

65. The written notice pleaded at paragraph 50 is admitted, however,

65.1 It is (for the reasons above) denied that Novo Banco was then or at any time party to the Facility Agreement or the Borrower under it.

65.2 It is accordingly denied that any notice addressed to it could be effective to accelerate the liability of BES to pay the loan as alleged.

65.3 The notice served was not served in accordance with clause 24 of the Facility Agreement, and was not effective.

66. In those circumstances paragraph 51 is denied because the sums have not fallen due in the manner alleged. Subject to that no admissions of the sums claimed are made.

67. It is denied that the Claimants or any of them are entitled to payment or interest or the relief claimed or any relief against Novo Banco as alleged by paragraphs 52-55 or otherwise.

RICHARD SALTER QC

JONATHAN MARK PHILLIPS

STATEMENT OF TRUTH

The Defendant believes that the facts stated in this Defence are true.

Signed .....

Full Name PATRÍCIA AFONSO FONSECA

Position or office held GENERAL COUNSEL OF NOVO BANCO, S.A.

Date: 24 March 2016

2015-213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT DISTRICT REGISTRY

BETWEEN:

(1) GUARDIANS OF NEW ZEALAND SUPERANNUATION FUND AS MANAGERS AND ADMINISTRATOR OF THE NEW ZEALAND SUPERANNUATION FUNDS

(2) ANDORRA GESTIÓ AGRICOL REIG, S.A.U.S.G.O.I.C

(3) APWIA FUND SPC LTD

(4) OLIFANT FUND, LTD.

(5) FYI LTD.

(7) ELLIOT INTERNATIONAL, L.P

(8) THE LIVERPOOL LIMITED PARTNERSHIP

(9) KARRICK LIMITED

(10) GL EUROPE LUXEMBOURG S.A. R.L.

(11) SILVER POINT LUXEMBOURG PLATFORM S.A. R.L

(12) TDC PENSIONSKASSE

Claimants

- AND -

NOVO BANCO S.A

Defendant

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