IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

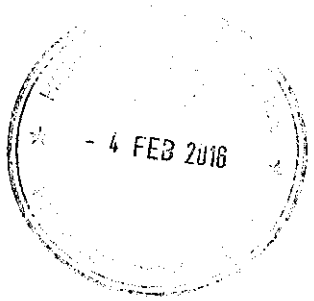
Mr Justice Blair

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 **2015 FOLIO 213**
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

BETWEEN:-

(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
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(11) SILVER POINT LUXEMBOURG PLATFORM S.À R.L
(12) TDC PENSIONSKASSE

Claimants

-and-

NOVO BANCO S.A.

Defendant

DRAFT REPLY

Introduction

1. Save insofar as it consists of admissions and non-admissions, and save where otherwise indicated below, the Claimants join issue with the Defendant in relation to the contents of its Defence. Save where the contrary is stated:

   (a) All references to paragraph numbers are to paragraphs in the Defence;

   (b) The same definitions used in the Particulars of Claim are adopted herein (save that, for consistency and ease, the August Decision will be referred to as the 3 August 2014 decision and the December Decision as the 22 December 2014 decision, without prejudice to the question of whether these matters were "*decisions*" as a matter of Portuguese law); and

   (c) The headings used in the Defence and the definitions set out at paragraph 1 of the Defence are also adopted herein but no admissions are made thereby.

2. Paragraphs 1 and 2 are noted.

The Oak Finance Facility

3. The facts pleaded at paragraphs 3 and 4 are admitted insofar as is set out in sections B, C, and D of the Particulars of Claim. Save as aforesaid, paragraphs 3 and 4 are not admitted.

4. As to paragraph 5, it is specifically denied that the Oak Finance Liability remained a liability of BES. The Oak Finance Liability was transferred to Novo Banco as set out in section E of the Particulars of Claim and below and it remains a liability of Novo Banco.

Creation and Status of Novo Banco

5. As a broad summary of the EBRRD and its implementation, paragraph 6 is admitted. The Claimants will rely upon the terms of the EBRRD as necessary. The EBRRD does not provide that all measures taken by resolution authorities are to be given effect, but rather identifies the particular measures which are to be given effect.

6. Paragraph 7 is not admitted.

7. As to paragraph 8:

(a) Save that the Claimants believe that NB was capitalised at *EUR* 4.9 billion (and not USD), paragraph 8.1 is not admitted.

(b) No admissions are made as to the purposes for which NB was created, although the quotation from the EBRRD is admitted.

(c) As to paragraph 8.3, the Claimants' position as to the scope of the relevant liabilities of NB is set out in the Particulars of Claim and below in this Reply.

(d) Save that the Claimants will rely upon the specific terms of the EBRRD as necessary, paragraph 8.4 is admitted.

(e) Paragraph 8.5 (which does not specify what is meant by "Resolution Measure") is denied and is in any event irrelevant to the issues in the present proceedings.

Alleged Bank of Portugal Decisions

8. As to paragraph 9, it is admitted that the decisions described were made by the Bank of Portugal but, save for the 3 August 2014 decision (the effect of which is set out at paragraphs 31 to 37 of the Particulars of Claim), it is denied that any of the decisions were made by the Bank of Portugal as a resolution authority within the meaning of the EBRRD.

9. As to paragraph 10:

(a) Paragraphs 10.1 to 10.3 inclusive are admitted as broad non-exhaustive summaries of the content of the relevant Portuguese laws, the details of which will be a matter for expert evidence in due course. For the avoidance of doubt:

(i) the provisions in the Portuguese Administrative Code that permit the actions referred to at (a) and (b) in paragraph 10.2 have substantial conditions attached to their exercise.

(ii) The "*powers*" alleged to have been exercised by the Bank of Portugal in the present case were exercised pursuant to the provisions of the Portuguese Banking Law and not the Portuguese Administrative Code.

(b) Paragraph 10.4 is denied. As a matter of Portuguese administrative law, the "*decisions*" subsequent to the 3 August 2014 decision were illegal.

(c) In any event, the relevance of the effect of the "*decisions*" subsequent to the 3 August 2014 decision as a matter of Portuguese law is denied in circumstances where the relevant question is whether any such decisions have any effect as a matter of English law.

(d) Paragraph 8 above is repeated.

10. Paragraph 11 is admitted, but (in circumstances where the relevant issue over which the English Court has jurisdiction is the effect of the decisions as a matter of English law, not Portuguese administrative law and the thresholds for obtaining interim injunctive relief thereunder) its relevance is denied.

The 3 August 2014 decision

11. As to paragraph 12 to 15:

(a) Paragraphs 31 to 37 of the Particulars of Claim are repeated.

(b) The quotations from the 3 August 2014 decision and Article 145-H(2) are admitted.

(c) Save as aforesaid, paragraphs 12 to 15 are not admitted.

12. Paragraph 16 is denied. Further, and without prejudice to the generality of that denial:

(a) The Oak Finance Liability did not fall within the Article 145-H(2) prohibition on transfer because the relevant criteria in the exclusion were not satisfied, for the reasons set out at paragraph 41 of the Particulars of Claim and below.

(b) None of the relevant parties at the time, considered the Oak Finance Liability to have been caught by the prohibition; paragraph 43 of the Particulars of Claim is repeated.

The 22 December 2014 decision

13. The quotation at paragraph 17 is admitted.

14. As to paragraph 18:

(a) Paragraph 18.1 is not admitted but in any case the relevance of the same is denied.

(b) Following the 3 August 2014 decision which (for the reasons set out in the Particulars of Claim) took effect as a matter of English law, any further "*decisions*" of the Bank of Portugal in relation to the transfer of the Oak Finance Facility are irrelevant save insofar as they have effect as a matter of English law, whatever their status as a matter of Portuguese law.

(c) Save as aforesaid, paragraph 18 is denied. For the avoidance of doubt, in addition to its ineffectiveness as a matter of Portuguese law the 22 December 2014 "*decision*" is not a decision which has any effect as a matter of English law.

15. Paragraph 19 is denied. NB's characterisation of the 22 December 2014 "*decision*" (and its effect on the 3 August 2014 decision) is wrong as a matter of Portuguese law, although for the reasons set out above, its status and effect as a matter of Portuguese law is in any event irrelevant.

The 11 February 2015 decision

16. Except that it is denied that any representations were made by GSI on behalf of Oak Finance, paragraph 20 is not admitted.

17. Save that no admissions are made as to the Bank of Portugal's reasoning (which is not within the Claimants' knowledge), paragraph 21 is admitted.

18. As to paragraph 22:

(a) The 11 February 2015 "*decision*" merely purported to "*confirm*" the 22 December 2014 Decision.

(b) In any case, it is denied (if it be alleged) that the 11 February 2015 "*decision*" has any effect as a matter of English law.

The 15 September 2015 re-transfer decision

19. Paragraph 23 is admitted insofar as it accurately quotes the decision.

20. As to paragraph 24:

(a) It is admitted that the 15 September 2015 re-transfer decision (which constituted an attempt extra-judicially to reverse the decision of Mr Justice Hamblen) was an "*administrative act*" as a matter of Portuguese law and that it was purportedly made pursuant to the Portuguese Banking Law.

(b) Save as set out above, paragraph 24 is denied.

(c) For the avoidance of doubt, it is denied (if it be alleged) that the 15 September 2015 decision (which is in any event internally inconsistent as to its effect) has any effect as a matter of English law.

The 29 December 2015 clarification and re-transfer decision

21. Paragraph 25 is admitted insofar as it accurately quotes the decision, and is otherwise not admitted (in particular in relation to the alleged motivation of the Bank of Portugal).

22. Paragraph 26 is denied. Without prejudice to the generality of that denial:

(a) The first part of the 29 December 2015 clarification and re-transfer decision was identical in substance to the 22 December 2014 decision and the 11 February 2015 decisions. The Claimants' case in respect of those decisions, set out above at paragraphs 14, 15 and 18, is repeated *mutatis mutandis*.

(b) The second part of the 29 December 2015 clarification and re-transfer decision was identical in substance to the 15 September 2015 re-transfer decision. The Claimants' case in respect of those decisions, set out above at paragraph 20, is repeated *mutatis mutandis*.

The 29 December 2015 perimeter decision

23. Paragraphs 27 and 28 are admitted insofar as they accurately quote the 29 December 2015 perimeter decision.

24. Save that no admissions are made as to the "*intent*" of the 29 December 2015 perimeter decision, paragraphs 29 and 30 are denied. Further and in any event, it is denied that the 29 December 2015 perimeter decision had any effect as a matter of English law.

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

25. As to paragraph 31:

(a) It is admitted that the 3 August 2014 decision had effect in English law, in particular because it constituted the *"application of the resolution tools"* or the *"exercise of resolution powers"* by the Bank of Portugal such that it was therefore a "*reorganisation measure*" under Article 2 of Directive 2001/24/EC (the "**Winding Up Directive**") which has effect in English law.

(b) Save as set out above, paragraph 31 is denied. Further, and for the avoidance of doubt (and without prejudice to the fact that the burden is on NB properly to articulate its case as to basis upon which the "*decisions*" are claimed to have the effect alleged):

(i) It is denied that any of the decisions subsequent to the 3 August 2014 decision constituted the application of a "*resolution tool*" and/or the exercise of a "*resolution power*" and was therefore a *"reorganisation measure"* within the meaning of Article 2 of the Winding Up Directive.

(ii) It is denied that any of the decisions subsequent to the 3 August 2014 decision constituted or effected a *"transfer"* within the terms of Article 66 EBRRD.

(iii) In particular, the decisions were either merely declaratory and/or confirmatory and/or clarificatory in nature and therefore have no status or effect under the scheme of the EBRRD or, insofar as they would otherwise constitute or purport to effect a re-transfer, failed to satisfy the criteria for valid re-transfers set out in Article 40(7) EBRRD.

26. As to paragraph 32:

(a) The first and second sentences are admitted and averred.

(b) The third sentence is specifically denied.

27. Paragraph 33 is denied. Without prejudice to the generality of that denial:

(a) It is denied that it is the "*cumulative effect*" of the decisions (whatever that may mean), which is to be given effect under Article 66 of the EBRRD.

(b) It is denied that the decisions subsequent to the 3 August 2014 decision, cumulatively or individually, amount to a "*transfer*", whether as a result of decisions purporting to modify the August decision, or those purporting to effect a "*re-transfer*". Further:

(i) In the case of the former, those decisions are not "*transfers*" within the meaning of Article 66 of the EBRRD because they do not effect any 'transfer' but are merely declaratory and/or confirmatory and/or clarificatory in nature;

(ii) In the case of the latter, those decisions (A) are not re-transfers because the criteria set out in Article 40(7) of the EBRRD were not satisfied and/or (B) such re-transfers failed to properly take into account the general principles governing the exercise of such resolution powers at Article 34.

(c) In the premises, none of the decisions following the 3 August 2014 decision have any effect as a matter of English law.

28. Paragraphs 34 and 35 are denied for the reasons set out above.

Oak Finance Liability an Excluded Liability in any event

29. Paragraph 36 is denied. The Oak Finance Liability was not an "*Excluded Liability*" within the meaning of Annex 2 of the 3 August 2014 decision, nor of Article 145-H(2)(a) or (c) of the Banking Law, for the reasons set out below.

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

30. Paragraph 37, which is inadequately particularised in that it fails to identify specifically how Oak Finance is alleged to have been acting on behalf of GSI, is denied. Without prejudice to the generality of that denial:

(a) It is denied as a matter of Portuguese law that a transaction is concluded or act performed "*on behalf 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*".

(b) As a matter of Portuguese law, the concept of "*acting on behalf of*" is a specific legal concept with a particular meaning under that law.

(c) As a matter of Portuguese law, for a person or entity to be "*acting on behalf of*" another, it is necessary for that person or entity to perform the relevant act subject to an obligation to transfer the result of the act to a third party, thereby making the act done imputable to the third party.

31. As to paragraph 38:

(a) Paragraph 38.1 is not admitted. In any case, none of these matters involved Oak Finance acting on behalf of GSI.

(b) As to paragraph 38.2, it is not admitted whether GSI undertook the roles alleged, but in any case, even if it did, the performance of such roles by an investment bank is standard part of financing transactions of this nature. None of these matters would have involved Oak Finance acting on behalf of GSI.

(c) As to paragraph 38.3, it is admitted that GSI held certain legal rights as pleaded below but it is denied (if it is alleged) that this meant that Oak Finance was acting on behalf of GSI.

(d) As to paragraph 38.4, no admissions are made as to the size of the fee due or paid to GSI, the relevance of which is in any event denied.

(e) As to paragraph 38.5, any actions of GSI in ordering the paying down of the sums under the loan facility (which are not admitted) would be consistent with its role as arranger of the loan facility, and do not in any case involve Oak Finance acting on behalf of GSI.

(f) Save as set out above, paragraph 38 is not admitted.

32. As to paragraph 39:

(a) It is admitted and averred that Oak Finance had "*independent legal personality*".

(b) It is denied that Oak Finance had no independent economic interest or role in the transaction. Oak Finance was the lender in respect of the Oak Finance Liability and the issuer of the Notes.

(c) It is admitted that following default and the assignment of its rights to the Noteholders, Oak Finance then had no continuing role, but it is denied (if the same be alleged) that this means that Oak Finance was acting on behalf of GSI or any Noteholder.

(d) Paragraph 39.2 is admitted.

(e) As to paragraph 39.3, the reference to the position "*In economic terms*" is vague and imprecise and irrelevant. Oak Finance did not act on behalf of any Noteholder. It was the debtor of the Noteholders who held security over the assets of Oak Finance.

Save as aforesaid, paragraph 39 is denied.

33. As to paragraph 40:

(a) The reference in the first sentence to the "*economic substance*" of the Notes falling "*at least substantially*" on GSI is vague, imprecise and irrelevant.

(b) The understanding of the Claimants is that GSI entered into certain hedging arrangements in respect of the Notes under which it acquired legal rights and obligations vis-à-vis the relevant counterparty. However, it is denied that this meant that Oak Finance was acting on behalf of GSI.

(c) It is admitted that the First Claimant purchased credit protection in the form of Credit Default Swaps from GSI.

(d) Paragraphs 40.2 to 40.7 are otherwise not admitted. For the avoidance of doubt, it is denied that any of these matters would mean that Oak Finance was acting on behalf of GSI.

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

34. Paragraph 41 is denied. The holders of share capital within the meaning of Article 145-H(2) of the Banking Code means either (a) actual direct or indirect shareholders or (b) holders of rights to acquire shares or to exercise voting rights (where the rights are exercisable by the

holder acting alone). In any case, this version of Article 145-H(2) only came into force on 2 August 2014 and does not apply to any holdings held prior to that date.

35. Paragraph 42 is denied. Even if the facts pleaded in that paragraph are correct (as to which no admissions are made), GSI would not in the period of 2 years prior to 3 August 2014 have held shares in BES within the meaning of Article 145-H(2) of the Banking Code equal to or exceeding 2% of BES's share capital. In particular, the Claimants understand that the majority of the rights which were disclosed by GSI were rights under cash-settled swaps and contract-for-difference transactions which conferred on GSI no ownership or voting rights in shares in BES.

36. Paragraph 43 is denied.

STATEMENT OF TRUTH

The Claimants believe that the facts stated in this Reply are true.

I am duly authorised by the Claimants to sign this statement.

Signed: Richard East.

Full name: RICHARD EAST

Position: PARTNER

Date: 27/05/16

Laurence Rabinowitz QC
Tom Smith QC
Adam Sher

Served this 27th day of May 2016 by Quinn Emanuel Urquhart & Sullivan UK LLP (ref RCE/KK) of 1 Fleet Place London EC4M 7RA, Solicitors for the Claimants.