Neutral Citation Number: [2016] EWCA Civ 1092

Case No: A3/2015/3007 & A3/2015/3008

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr. Justice Hamblen
[2015] EWHC 2371 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 November 2016

Before :

LORD JUSTICE MOORE-BICK
Vice-President of the Court of Appeal, Civil Division
LADY JUSTICE GLOSTER
and
LORD JUSTICE SALES

- -

Between :

(1) GUARDIANS OF NEW ZEALAND SUPERANNUATION FUND 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/ Respondents**
- and - **NOVO BANCO, S.A.**	**Defendant/ Appellant**
- and -	
BANCO de PORTUGAL	**Intervener**

And between :

GOLDMAN SACHS INTERNATIONAL	**Claimant/ Respondent**
- and -	
NOVO BANCO S.A.	**Defendant/ Appellant**
- and -	
BANCO de PORTUGAL	**Intervener**

- -
- -

Mr. Richard Salter Q.C. and Mr. Jonathan Mark Phillips (instructed by **Pinsent Masons LLP**) for the **appellant**
Mr. Lawrence Rabinowitz Q.C., Mr. Tom Smith Q.C. and Mr. David Caplan (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **respondents in appeal No. A3/2015/3007**
Mr. Tim Lord Q.C., Mr. Thomas Plewman Q.C. and Mr. Max Schaefer (instructed by **Bird & Bird LLP**) for the **respondent in Appeal No. A3/2015/3008**
Mr. Mark Howard Q.C. and Mr. Stephen Midwinter (instructed by **Enyo Law LLP**) for the **intervener**

Hearing dates : 27th & 28th July 2016
- -

Approved Judgment

Lord Justice Moore-Bick :

Overview

1. These appeals have their origins in the collapse in 2014 of a substantial Portuguese bank, Banco Espírito Santo, S.A. ("BES"), and the measures taken by the Portuguese central bank, Banco de Portugal, to avert a potential financial crisis.

2. In June 2014 Oak Finance Luxembourg S.A. ("Oak") entered into a Facility Agreement with BES under which it agreed to lend BES approximately US$835 million. The agreement contained an express choice of English law and jurisdiction. On 3rd July 2014 BES drew down the sum of US$784,564,000.

3. By the beginning of August 2014 it had become clear that BES was in financial difficulties. On 3rd August 2014 Banco de Portugal established by resolution a new financial institution, Novo Banco, S.A., to which most, but not all, of the assets and liabilities of BES were transferred. The respondents claim as assignees of Oak to recover interest and capital repayments due under the Facility Agreement. They maintain that as a result of the measures taken by Banco de Portugal under the legislation giving effect to Directive 2014/59/EU (the Recovery and Resolution Directive, commonly known as the "EBRRD") the liabilities of BES under the agreement ("the Oak liability") were transferred to Novo Banco. However, Novo Banco denied that the obligations of BES under the Facility Agreement had been transferred to it and on 26th February 2015 the respondents started proceedings in the High Court to enforce their claims, relying on Article 25 of the Judgments Regulation (Regulation (EU) No. 1215/2012). In support of its contention that the obligations of BES under the Facility Agreement have not been transferred to it, Novo Banco relies on various decisions of Banco de Portugal made between 22nd December 2014 and 29th December 2015 declaring that the Oak liability was not transferred to Novo Banco but remained with BES, or (in the case of the decisions made in September and December 2015) purporting, if necessary, to transfer the Oak liability back to BES. Novo Banco therefore applied to set aside the proceedings against it on the grounds that the court had no jurisdiction to entertain them. In the alternative, it sought to have the proceedings stayed pending a final decision of the Portuguese administrative court in proceedings brought by the respondents challenging the decision of Banco de Portugal in December 2014 that the Oak liability had not been transferred to Novo Banco.

4. The applications in the two actions were heard together by Hamblen J. It was common ground that for the purposes of establishing jurisdiction it was sufficient for the respondents to persuade the court that they had the better of the argument that the Oak liability had been transferred to Novo Banco, which had thereby become bound by the English jurisdiction clause in the Facility Agreement: see *Canada Trust v Stolzenberg (No 2)* [1998] 1 W.L.R. 547 and *Bols Distilleries v Superior Yacht Services* [2006] UKPC 45, [2007] 1 W.L.R. 12. The judge held that the respondents did have the better of the argument that the Oak liability had been transferred to Novo Banco on 3rd August 2014 and that Novo Banco had therefore become bound by the English jurisdiction clause. There was a dispute about the effect of the decision made in December 2014 (subsequently confirmed in February 2015), but the judge held that the respondents had the better of the argument that that dispute was one that fell within the scope of the jurisdiction clause and was therefore to be determined by the

English courts. In any event, however, the judge was also persuaded that the respondents had the better of the argument that the decision made by Banco de Portugal in December 2014 did not involve the exercise of a power provided for by the EBRRD, did not amount to a decision to transfer the Oak liability back to BES, and was not effective to do so. The judge also rejected an argument by Novo Banco that the court should decline to exercise jurisdiction in this case on the grounds that the acts of Banco de Portugal were not justiciable in the English courts. That particular argument was not pursued on the appeal and I need therefore say no more about it.

The Directives

5. Before summarising the parties' submissions it is necessary to consider in more detail the two directives that lie at the heart of this appeal, Directive 2001/24/EC, which concerns the reorganisation and winding-up of credit institutions ("the Reorganisation Directive") and Directive 2014/59/EU, the EBRRD, which is concerned with establishing a framework for the recovery and resolution of failing credit institutions and investment firms.

(a) Directive 2001/24/EC

6. Before the judge Novo Banco placed little, if any, reliance on the Reorganisation Directive, but it formed an important part of its case on appeal. As the recitals make clear, its purpose is to ensure mutual recognition of measures taken in relation to the reorganisation and winding up of credit institutions by the competent authorities of the Member State by which they are authorised to conduct business (described in the directive as "the home Member State"). To that end the directive requires, with some exceptions, that measures which may affect third parties' existing rights be given effect by every other Member State, regardless of the place in which any individual branch of the institution is located or the law which governs the obligations which it has undertaken.

7. Article 3 of the directive provides as follows:

> Article 3
>
> Adoption of reorganisation measures – applicable law
>
> 1. The administrative or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of one or more reorganisation measures in a credit institution, including branches established in other Member States.
>
> 2. The reorganisation measures shall be applied in accordance with the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in this Directive.
>
> They shall be fully effective in accordance with the legislation of that Member State throughout the Community without any

> further formalities, including as against third parties in other Member States, even where the rules of the host Member State applicable to them do not provide for such measures or make their implementation subject to conditions which are not fulfilled.
>
> The reorganisation measures shall be effective throughout the Community once they become effective in the Member State where they have been taken.

8. "Reorganisation measures" are defined in Article 2 (as amended by Article 117 of the EBRRD) as meaning:

> . . . measures which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims; *those measures include the application of the resolution tools and the exercise of resolution powers provided for in Directive 2014/59/EU*. (Emphasis added.)

(b) Directive 2014/59/EU

9. The EBRRD was adopted in the wake of the financial crash of 2008, which demonstrated, among other things, the need for states to have at their disposal far-reaching powers to deal with the threat of widespread damage to financial stability posed by the collapse of credit institutions. Its purpose was to provide a minimum degree of harmonisation among Member States of the powers available to enable them to respond quickly and effectively to threats of that kind. Article 3(1) therefore requires each Member State to designate as its resolution authority a public administrative authority that is empowered to apply the resolution tools and exercise the resolution powers set out in the directive. As a result, the resolution authorities of the Member States are to have at their disposal a range of resolution tools and powers, the use of which may adversely affect the rights of third parties, including shareholders and creditors. The resolution tools include the establishment of a "bridge" institution, which has as its main purpose the task of ensuring that essential financial services continue to be provided to the clients of the failing institution and that essential financial activities continue to be performed: see recital (65). Recital (119) recognises that the Reorganisation Directive is designed to ensure that all assets and liabilities of the failing institution are dealt with in a single process in the home Member State and that, in order to achieve an effective resolution, that directive should apply to a decision involving the application of one of the resolution tools.

10. The bridge institution tool is described in Article 40 of the EBRRD. It is unnecessary for present purposes to set out many of its terms in detail, but the following are of particular importance in this case:

Article 40

Bridge institution tool

> 1. In order to give effect to the bridge institution tool . . . Member States shall ensure that resolution authorities have the power to transfer to a bridge institution:
>
> (a) shares or other instruments of ownership issued by one or more institutions under resolution;
>
> (b) all or any assets, rights or liabilities of one or more institutions under resolution.
>
> . . .
>
> 6. Following an application of the bridge institution tool, the resolution authority may:
>
> (a) transfer rights, assets or liabilities back from the bridge institution to the institution under resolution, . . . , provided that the conditions laid down in paragraph 7 are met;
>
> (b) . . .
>
> 7. Resolution authorities may transfer shares or other instruments of ownership, or assets, rights or liabilities back from the bridge institution in one of the following circumstances:
>
> (a) the possibility that the specific shares or other instruments of ownership, assets, rights or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;
>
> (b) the specific shares or other instruments of ownership, assets, rights or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of shares or other instruments of ownership, assets, rights or liabilities specified in the instrument by which the transfer was made.
>
> Such a transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose.

11. Recognition of measures taken by the resolution authority of another Member State is expressly provided for by Article 66 in the following terms:

Article 66

Power to enforce crisis management measures or crisis prevention measures by other Member States

> 1. Member States shall ensure that, where a transfer of shares, other instruments of ownership, or assets, rights or liabilities includes assets that are located in a Member State other than the State of the resolution authority or rights or liabilities under the law of a Member State other than the State of the resolution authority, the transfer has effect in or under the law of that other Member State.
>
> . . .
>
> 3. Member States shall ensure that shareholders, creditors and third parties that are affected by the transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in paragraph 1 are not entitled to prevent, challenge, or set aside the transfer under any provision of law of the Member State where the assets are located or of the law governing the shares, other instruments of ownership, rights or liabilities.

12. In addition, the integration of the Reorganisation Directive and the EBRRD was achieved by Article 117, by which there was added to the definition of "reorganisation measures" in Article 2 of the Reorganisation Directive a specific reference to the application of the resolution tools and the exercise of the resolution powers: see paragraph 8 above.

Domestic legislation

13. The provisions of the Reorganisation Directive and the EBRRD have been incorporated into the domestic legislation of both Portugal and the United Kingdom. In the case of Portugal, at the time of the decisions with which this appeal is concerned they had been incorporated into Title VIII of the Legal Framework of Credit Institutions and Financial Companies Decree-Law No. 298/92 of 31st December 1992 by Decree-Law 31-A/2012 of 10th February 2012 ("the Banking Law"). Articles 145-G and 145-H gave Banco de Portugal the power to transfer assets and liabilities from an institution under resolution to and from a bridge bank and to determine which assets and liabilities were to be the subject of any such transfer or retransfer. The power to make such transfers was, however, subject to a prohibition on the transfer from an institution under resolution of liabilities to various classes of creditors, including creditors which at the time of the transfer, or in the two years leading up to it, owned 2% or more of the share capital of the institution and third party creditors acting on behalf of such persons.

14. In the case of the United Kingdom the legislation takes the form of the Credit Institutions (Reorganisation and Winding up) Regulations 2004 ("the 2004 Regulations"), the Bank Recovery and Resolution Order 2014 (which amended the Banking Act 2009) and the Bank Recovery and Resolution (No. 2) Order 2014. The 2004 Regulations include the following provisions:

> 5.— Reorganisation measures and winding-up proceedings in respect of EEA credit institutions effective in the United Kingdom

> (1) An EEA insolvency measure has effect in the United Kingdom in relation to—
>
> (a) any branch of an EEA credit institution,
>
> (b) any property or other assets of that credit institution,
>
> (c) any debt or liability of that credit institution
>
> as if it were part of the general law of insolvency of the United Kingdom.
>
> . . .
>
> (6) In this regulation—
>
> . . .
>
> "EEA insolvency measure" means, as the case may be, a directive reorganisation measure or directive winding-up proceedings which have effect in relation to an EEA credit institution by virtue of the law of the relevant EEA state.

15. A "directive reorganisation measure" is defined in Regulation 2 as meaning

> . . . a reorganisation measure as defined in Article 2 of the reorganisation and winding up directive which was adopted or imposed on or after 5th May 2004, *or any other measure to be given effect in or under the law of the United Kingdom pursuant to Article 66 of the recovery and resolution directive.* (Words in italics added by the Bank Recovery and Resolution (No. 2) Order 2014 with effect from 10th January 2015.)

Banco de Portugal

16. Banco de Portugal is the Portuguese central bank and at all material times was designated as the resolution authority for Portugal. There was expert evidence of its position and powers under Portuguese law, which the judge accepted for the purposes of the application and which was not challenged before us. It can be summarised for present purposes as follows:

(i) Under Article 145-G and H of the Portuguese Banking Law, Banco de Portugal had the power to transfer assets from BES to Novo Banco and when doing so acted in its capacity as an administrative authority;

(ii) As an administrative authority it had the power to make decisions establishing the legal rights and obligations of third parties;

(iii) Administrative acts of the kind in question are directly effective in Portuguese law (subject to certain exceptions), unless and until annulled by the administrative courts;

(iv) An administrative authority may interpret its own administrative acts with retrospective effect.

Banco de Portugal's decisions

17. In order to understand how the arguments developed, both before the judge and before this court, it is necessary to refer briefly to the following decisions made by Banco de Portugal in relation to the establishment of Novo Banco and the transfer to it of rights and liabilities formerly vested in BES:

(a) The August decision

(i) By a resolution passed on 3rd August 2014 Banco de Portugal established Novo Banco as a bridge institution and transferred to it all the rights and liabilities of BES as listed in Annexes 2 and 2A;

(ii) By Annex 2 all BES's liabilities to third parties were transferred to Novo Banco with the exception of the following:

> "(i) 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 . . . (c) . . . or third parties acting on behalf of the persons or entities referred to in the foregoing subparagraphs . . .
>
> . . .
>
> (v) Any liabilities or contingencies resulting from wilful misconduct, fraud and breaches of regulatory, criminal or administrative provisions; . . . "

Annex 2 went on to provide that "BES liabilities that are not transferred will be maintained within the legal framework of BES".

(iii) Annex 2 also provided for the transfer of assets and liabilities back to BES in the following terms:

> "After the transfer referred to in the foregoing subparagraphs, Banco de Portugal may at any time transfer or re-transmit assets [or] liabilities . . . between BES and Novo Banco, S.A. in accordance with Article 145-H(5) of the Legal Framework."

(iv) Annex 2A set out the balance sheet of BES as at 30th June 2014 (with adjustments at the time of transfer, 3rd August 2014) showing the adjustments necessary to ensure that the valuation was conservative for the purposes of determining the capital requirements of Novo Banco, calculated to be €4.9 billion. Annex 2A showed among the liabilities transferred to Novo Banco a figure for "Resources from customers and other loans" which included the Oak liability. However, the heading of the balance sheet made clear that the balance sheet and the adjustments were "Preliminary", no doubt because the resolution had also appointed PricewaterhouseCoopers as an independent

entity to evaluate the assets and liabilities transferred within 120 days, and it was envisaged that further adjustments might be made to the balance sheet;

(v) On 11th August 2014 Banco de Portugal decided to clarify and adjust Annex 2 to the August decision in certain respects which do not affect the outcome of the appeal. What is relevant for present purposes is that the recitals to the deliberations of the directors demonstrate that the task of identifying, for example, which liabilities had *not* been transferred by virtue of the exclusionary provisions contained in sub-paragraph (b)(i) of Annex 2 was an ongoing process: see, in particular, recitals 12-16.

(b) The December decision

On 22nd December 2014, having concluded that there were serious and well-grounded reasons to believe that in entering into the Facility Agreement Oak had acted on behalf of Goldman Sachs International ("GSI") and that at the material time GSI had held 2% or more of the share capital of BES, the directors of Banco de Portugal passed a resolution in the following terms:

> "(a) the liability of Banco Espírito 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 Espírito Santo are to adjust their accounting records to this resolution and act in accordance with what is ordered herein."

As the judge recorded in paragraph 60 of his judgment, the experts accepted that the December decision was binding and effective as a matter of Portuguese law.

(c) The February decision

On 11th February 2015, having considered representations from GSI, Banco de Portugal gave its reasons for concluding that Oak had been acting for GSI and that at the material time GSI had held more than 2% of the share capital of BES, and resolved to adhere to the December decision.

(d) The September decision

On 15th September 2015, following the decision of Hamblen J. in this case, Banco de Portugal, having formally reaffirmed its view that the Oak liability had not been transferred to Novo Banco, decided, both as a reorganisation measure and as a resolution measure, to transfer the liability back to BES with effect from 3rd August 2014, insofar as it might be necessary to do so in order for the position to be recognised in the United Kingdom and other Member States of the European Union.

(e) The December 2015 decision

In response to various legal proceedings both in Portugal and abroad, on 29th December 2015 Banco de Portugal decided, without prejudice to its earlier

decisions, formally to transfer various liabilities, including the Oak liability, back to BES and to amend Annex 2 to the August decision by adding an express provision that the Oak liability was among the liabilities excluded from the general transfer of liabilities from BES to Novo Banco.

The parties' submissions

18. Given that the appeal raises questions of fundamental importance about the efficacy of measures taken by Banco de Portugal as the designated resolution authority for Portugal and the recognition of its acts by other Member States of the European Union, it is 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. However, it is convenient to refer at the outset to the submissions made by Mr. Richard Salter Q.C. on behalf of Novo Banco. Mr. Salter drew attention to the relationship between the Reorganisation Directive and the EBRRD, both of which, he submitted, formed part of an integrated set of European rules for dealing with failing financial institutions, under which measures taken by the home Member State are to be given universal effect throughout the Community, even in relation to obligations governed by foreign law. He therefore submitted that the directives should be interpreted and applied in a way that promoted the objective of giving universal effect to decisions of the relevant resolution authority and that the judge had been wrong to adopt what might be described as a common law 'chronological' approach when analysing the effect of the decisions of Banco de Portugal in this case. Mr. Salter also submitted (although he had not taken the point below) that the decisions of Banco de Portugal were to be recognised and given effect in this country under the Reorganisation Directive. The September and December 2015 decisions, on which he also sought permission to rely, put the matter beyond any doubt.

19. The submissions made by Mr. Mark Howard Q.C. on behalf of Banco de Portugal ultimately turned on the analysis of the directives put forward by Mr. Salter. As he himself said, his primary argument was very simple: the English courts are obliged to give decisions of Banco de Portugal, acting both as the relevant administrative authority in BES's home Member State and as resolution authority for Portugal, the effect they have under Portuguese law and the effect of the August decision under Portuguese law is determined by the December decision, which is binding on all parties, unless and until it is overturned by the Portuguese administrative courts. On that basis he submitted that the judge had been wrong to embark on an enquiry into the effect of the August decision without having regard to the December decision and wrong to hold that the respondents had the better of the argument that the Oak liability was not excluded from the transfer to Novo Banco under the August decision, because the December decision established definitively for the purposes of Portuguese law that it had been. It was irrelevant for these purposes to ask whether the December decision was intended to, or did, operate as a transfer of the Oak liability back to BES under the EBRRD, or even whether it was a resolution measure. As a decision of an administrative authority it determined that as a matter of Portuguese law the August decision had not been effective to transfer the Oak liability to Novo Banco.

20. Mr. Howard's alternative submission was that, whatever its character, the December decision was a reorganisation measure to which the English courts were bound to give effect under Article 3 of the Reorganisation Directive, because it was part of the measures adopted by Banco de Portugal by way of the reorganisation of BES.

21. The submissions of Mr. Lawrence Rabinowitz Q.C. on behalf of the respondents in appeal A3/2015/3007 were, in a sense, equally simple. He submitted that there could be no doubt that the August decision, which established Novo Banco as a bridge bank and transferred to it most of the liabilities of BES, involved the application of a resolution tool. It was complete, in the sense that its effect did not depend on any supplementary decision, and therefore had to be recognised as effective by the English courts. The judge had held that the respondents had the better of the argument that the Oak liability had been transferred from BES to Novo Banco and therefore only a decision transferring it back to BES which satisfied the requirements of the EBRRD could effectively reverse that position. Whether Banco de Portugal had made any such decision was a matter for the English courts to determine. The December decision did not purport to transfer the liability back from Novo Banco to BES and could not properly be interpreted in that way. It therefore did not involve the application of a resolution tool or a resolution power recognised by the EBRRD. Accordingly, whatever its effect in Portuguese law, it was not a decision which the English courts were required to recognise. In substance, Mr. Rabinowitz submitted that on the issues argued before him the judge had been right for the reasons he gave. Before the judge Novo Banco had not sought to argue that, regardless of its status under the EBRRD, the December decision was a reorganisation measure, to which effect had to be given under the Reorganisation Directive, and should not be allowed to raise the point for the first time on appeal. In any event, however, the argument was misconceived, because the purpose of the December decision was not to preserve or restore the financial position of BES.

22. Mr. Rabinowitz resisted Novo Banco's application for permission to rely on the September and December 2015 decisions on the grounds that the question of jurisdiction had to be determined by reference to the position on 26th February 2015, when the proceedings had been commenced. Moreover, they raised issues which could be properly determined only with the benefit of further expert evidence concerning their effect in Portuguese law. To call such additional evidence would cause undue disruption to the progress of the appeal.

23. Mr. Tim Lord Q.C. for GSI adopted Mr. Rabinowitz's submissions. He emphasised that there had been no appeal against the judge's finding that the respondents had the better of the argument that the effect of the August decision was to transfer the Oak liability to Novo Banco. He submitted that the purpose of the EBRRD was to harmonise the tools and powers available to Member States for dealing with failing financial institutions and to require universal recognition of measures taken by resolution authorities, provided they had been taken under, and in accordance with, the terms of the directive, but not otherwise. Mr. Lord, in a submission adopted by the other respondents, also argued that Novo Banco had become bound by the English jurisdiction clause in the Facility Agreement as a result of an exchange of emails that took place between 11th and 14th August 2014, in the course of which Novo Banco confirmed that the Oak liability had been transferred to it.

The effect of the Directives

24. The Facility Agreement was governed by English law. It was therefore common ground that the obligations to which it gave rise were governed by English law and, in accordance with the view traditionally taken by the common law, are unaffected by foreign legislation. However, in the interests of ensuring an orderly and consistent

approach to the failure of credit institutions, the European Union has legislated to ensure that (subject to certain exceptions which do not apply in this case) measures taken by the authorities of the home Member State are recognised and applied by all other Member States and given the effect they would have under the law of the home Member State. That principle, which is enshrined in Article 3 of the Reorganisation Directive, is fundamental to the scheme adopted by the European Union for dealing with the widespread and potentially disastrous consequences of the failure of a major financial institution. In the recent case of *Kotnik and Others v Državni zbor Republike Slovenije* (Case C-526/14) the Court of Justice reaffirmed in paragraph 105 that:

> " . . . the reorganisation measures taken by the administrative or judicial authorities of the home Member State, that is, the Member State in which a credit institution has been authorised, must have, in all the other Member States, the effects which the law of the home Member State confers on them. . . . "

25. By contrast, the purpose of the EBRRD was to harmonise the legislation of the Member States to the extent of making available to their resolution authorities as a minimum the resolution tools and powers for which it provides. Measures taken in the application of those tools and the exercise of those powers were by Article 117 expressly brought within the definition of "reorganisation measures" in Article 2 of the Reorganisation Directive and thus within the scheme of mutual recognition, but in *Kotnik* the court made it clear that the definition of reorganisation measures is cast in broad terms and that burden-sharing measures of a kind that did not fall within the scope of the EBRRD could nonetheless fall within its terms. It will be necessary to consider the decision in *Kotnik* in more detail at a later stage in this judgment.

The effect of the August and December decisions

26. It is common ground that the August decision, involving, as it did, the establishment of a bridge bank, Novo Banco, to which some of the assets and liabilities of BES were transferred, involved the application of one of the resolution tools and must therefore be recognised and given effect by the English courts as a reorganisation measure. The issue that divides the parties is whether the court must also recognise and give effect to the December decision, which purported to declare the effect of that earlier decision.

27. The judge's approach was to consider first the effect of the August decision and then, having held that it was a resolution measure and that the respondents had the better of the argument that it was effective to transfer the Oak liability to Novo Banco, went on to consider as a separate question whether the December decision was also one which the English courts were bound to recognise and, if so, whether it affected the position brought about by the August decision. In adopting that approach he inevitably proceeded on the basis that nothing less than a decision by Banco de Portugal which satisfied the requirements of the EBRRD for a transfer of the Oak liability back to BES would do. The judge recorded in paragraph 78 of his judgment that it was for the English courts, applying English law, to decide whether any particular act of a resolution authority was a measure to which effect was to be given under English law. That is no doubt correct, as far as it goes, and indeed was not challenged by Novo Banco or Banco de Portugal, but it fails to take account of the fact that the obligation

to recognise the August decision involves giving it the effect that it had in Portuguese law at the date when the respondents commenced these proceedings.

28. It may be correct to say, as the judge held, that the August decision was complete as soon as it was made and that in principle it was possible to determine (albeit perhaps only after enquiry) one way or the other whether the Oak liability had, or had not, been transferred to Novo Banco. As the judge said, the facts are the facts. However, because of the way in which the excluded liabilities had been described, there was room for disagreement about the effect of the decision, as there might have been if it had been alleged that a particular liability had resulted from wilful misconduct or fraud. The dispute over the extent, if any, of GSI's interest in BES and the role of Oak could have been resolved by the Portuguese administrative courts, but the judge found (and this was not challenged) that, as a decision of an administrative authority, the December decision was effective as a matter of Portuguese law and binding upon the parties to whom it was addressed, unless and until it was set aside by the administrative courts. As a result of the December decision the August decision had a more limited effect in Portuguese law than might otherwise have been supposed, but in my view the English courts are obliged under the directives and under regulation 5 of the 2004 Regulations to give it the same effect as it had under Portuguese law at the date when the issue arose. In other words, they are bound to accept that it was not effective to transfer the Oak liability to Novo Banco.

29. It follows, in my view, that it is unnecessary and inappropriate to ask whether the December decision was a resolution measure within the meaning of the EBRRD or whether the instruction to Novo Banco and BES to correct their accounts amounted to a decision to transfer the Oak liability back to BES. The decision did not purport to transfer the liability back to BES; it purported to declare that the August decision did not transfer that liability to Novo Banco, and in that context the instruction to correct the accounts seems to me a slender basis on which to hold that the effect of the decision was to transfer the Oak liability back to BES. In those circumstances I do not think it necessary to decide whether there was sufficient warning in the August decision of the possibility that the Oak liability might be transferred back to BES to satisfy the requirements of Article 40(7)(a) of the EBRRD. The possibility that assets transferred to Novo Banco might be transferred back to BES was expressly stated in the August decision and was thus drawn to the attention of third parties. Mr. Rabinowitz and Mr. Lord both submitted that no asset or liability could be the subject of a retransfer unless it had been specifically identified in the original decision as being liable to retransfer, but I am inclined to think that it is more consistent with the aims of the directive to hold that Article 40(7)(a) is satisfied if the liability in question falls within a class of liabilities identified in the original decision as being susceptible to retransfer.

30. Mr. Rabinowitz and Mr. Lord argued that to recognise the decision of an administrative authority in the home Member State which did not itself amount to a resolution measure would enable that state to circumvent the limitations contained in the EBRRD and thus the measures put in place to safeguard creditors. That is no doubt a powerful point, but I think it fails to recognise two important matters: first, that the purpose of the EBRRD was to harmonise the legislation of Member States by ensuring that every resolution authority has certain minimum tools and powers at its disposal, not to determine what effect the use of those tools and powers should have

under the domestic law of the home state; and secondly, that 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 is other than that which it has under Portuguese law (which is the effect of the decision below), there would be a violation of the principle of universal recognition on which the law in this area is based. Moreover, as the decision in *Kotnik* shows, it does not follow that a decision which does not fall within the scope of the EBRRD cannot amount to a reorganisation measure and so be entitled to universal recognition for that reason alone.

Was the December decision a reorganisation measure?

31. The first question for determination under this head is whether Novo Banco should be given permission to amend its grounds of appeal to argue that the December decision is a reorganisation measure and is entitled on that ground alone to universal recognition under the Reorganisation Directive. For my own part I would grant the necessary permission. The point raises a short question of law which can conveniently be argued and decided in the context of the other issues that have been raised on the appeal without any significant disadvantage to the respondents.

32. Mr. Rabinowitz submitted that the December decision did not fall within the definition of "reorganisation measures" in Article 2 of the Directive because, viewed in the context of the August decision, to which it was ancillary, it was not a measure intended to preserve or restore the financial situation of BES. On the contrary, he submitted, the August decision was the first in a series of measures intended to culminate in its liquidation. Mr. Howard, on the other hand, contended that one of the purposes of both the August and December decisions was to enable BES to be wound up in an orderly manner, avoiding a sudden collapse of a kind that could have undermined financial stability in Portugal more generally. Mr. Salter argued that the reference to "preserving or restoring" the financial situation of a credit institution should be interpreted as extending to the financial activities of the failing institution, because the Court of Justice in *Kotnik* has emphasised that the expression has a broad meaning and because the use of a bridge bank (a measure expressly included in the definition of "reorganisation measures" as a result of Article 117 of the EBRRD) is directed to that very end, rather than simply to propping up the failing institution.

33. In *Kotnik* the court was concerned with what were described as "burden-sharing measures" imposing an obligation on holders of hybrid capital and subordinated creditors of the failing institutions to bear part of the burden of providing additional capital required to restore the financial position of the relevant credit institutions and to overcome their capital shortfall. The measures in question, imposed under national powers that pre-dated the EBRRD, amounted to what are now called "bail-in" measures. Bail-in measures now form one of the resolution measures for which the EBRRD provides and have been expressly brought within the definition of "reorganisation measures" by Article 117 of the directive. One question posed by the Slovenian Constitutional Court was whether the extension of the definition implied that the burden-sharing measures under consideration did not have the character of

"reorganisation measures" so as to be entitled to universal recognition by the Member States.

34. Given the circumstances in which the question arose, it is not surprising that the Court of Justice held that, regardless of Article 117, the burden-sharing measures were reorganisation measures within the meaning of Article 2 of the Reorganisation Directive, because they were intended to preserve or restore the financial situation of a credit institution. In the present case the argument is more difficult, however, because there does not appear to have been any intention to maintain BES as a going concern in the long term. The December decision was no more than one element in a process leading to its orderly winding up. However, it is accepted that the August decision was a reorganisation measure, if only by virtue of its being a resolution measure, and it is clear that an important part of its purpose was to stabilise the position of BES pending its winding up. The December decision purported to clarify the effect of the August decision and was therefore very closely connected to it. In those circumstances I think that the December decision is to be regarded as, or as part of, a reorganisation measure and is entitled to universal recognition under the Reorganisation Directive. In my view, to hold otherwise would 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.

The September and December 2015 decisions

35. I would not, on the other hand, give Novo Banco permission to amend its grounds of appeal to rely on the September and December 2015 decisions. For the purposes of determining jurisdiction the position is to be judged by reference to the date on which the proceedings were commenced, 26th February 2015. That much was common ground, even if the effect of those decisions, or either of them, was to reverse the position which obtained on that date. I therefore agree with Mr. Rabinowitz that the September and December 2015 decisions came too late to affect the position and I would refuse permission to rely on them for that reason alone. Quite apart from that, however, the application to rely on the December 2015 decision was made at a very late stage. The respondents have obtained expert evidence suggesting that the decisions are void under Portuguese law, but the matter cannot be said to have been properly investigated and I do not think it would be right to allow the scope of the appeal to be extended by introducing them at this stage.

The exchange of emails

36. On 11th August 2014 Mr. Antonio Esteves of the Securities Division of GSI sent an email to Mr. Joao Moreira at BES warning him that Mr. Jonny Cheatle, also of GSI, would be sending him an email asking for official confirmation that the Oak liability had been transferred from BES to Novo Banco. A few minutes later Mr. Cheatle sent a message to Mr. Moreira seeking that confirmation. Mr. Gustavo Gomes Ferreira of BES's Legal Department responded on 14th August 2014 in the following terms:

> "In response to your email below and letter dated 11th August 2014 we hereby confirm that the Facility Agreement dated 30th June 2014 . . . has been transferred to Novo Banco S.A. as a

> consequence of the resolution measure applied on 3rd August 2014 and subsequent announcements by Banco de Portugal."

37. Mr. Lord submitted that this exchange of messages was sufficient to constitute an agreement on the part of Novo Banco that the Oak liability had been transferred to it and was therefore sufficient to satisfy the requirements of Article 25 of the Judgments Regulation as an agreement to be bound by the English jurisdiction clause in the Facility Agreement.

38. In my view there are several difficulties with that argument. In the first place, the messages in question appear to have passed between GSI and BES. The critical message of 14th August 2014 was sent from BES's Legal Department and does not purport to have been sent on behalf of Novo Banco, nor, if it was, is it at all clear that it was sent by someone who had authority to speak on its behalf in relation to a matter of that kind. However, since the August decision provided that all employees of BES were to be transferred to Novo Banco, it may be that the messages should properly be read as emanating from Novo Banco. Putting all that on one side, however, the message from Mr. Ferreira did no more than confirm that the Facility Agreement had been transferred to Novo Banco. It is not said that it contained or evidenced any independent contractual undertaking and, unsurprisingly, there was no reference to the jurisdiction clause as such. Nonetheless, it was said that this rather anodyne exchange was sufficient to satisfy the requirements of Article 25 of the Judgments Regulation, because it amounted to an agreement to submit to the jurisdiction of the English courts that had been made and recorded in the required form.

39. In a case where a prorogation of jurisdiction occurs as a result of the incorporation of a suitable clause in a contract between the parties, neither party can be heard to say that he is not bound by its terms, whether he has read them or not. In the absence of a contract, however, the case is rather different. In such a case the court must satisfy itself that the party who is said to have agreed to submit to a jurisdiction other than that of his domicile has in fact done so. In *Salotti v RŰWA Polstereimaschinen G.m.b.H.* [1976] E.C.R. 1831 (a decision on a predecessor of Article 25) the court emphasised the need for genuine consent to the prorogation of jurisdiction and for that consent to be clearly and precisely demonstrated. In my view that requirement is not satisfied in the present case. There is no reason to think that those acting for Novo Banco had in mind, or could reasonably be understood to have had in mind, the jurisdiction clause in the Facility Agreement, nor are there any grounds for regarding this exchange as a manifestation of a conscious intention on the part of Novo Banco to submit to the jurisdiction of the English courts. In my view this exchange falls far short of what would be required to establish an agreement to submit to the jurisdiction of a kind that would satisfy Article 25.

Conclusion

40. The issues canvassed on the appeal all ultimately go to the question whether the respondents have the better of the argument that Novo Banco is a party to an agreement that the claims which they seek to pursue should be determined by the English courts. For these reasons I have given, I do not think that they do and accordingly I would allow the appeal.

Lady Justice Gloster:

41. I agree with the judgment of Moore-Bick LJ. I differ from the views expressed by Sales LJ in three respects:

(i) First, I do not think that it is a correct analysis of the August decision to conclude, as he does, that "the assets and liabilities transferred were as reflected in Annex 2A"; see paragraph 45 below. Point two of the August decision identifies the assets and liabilities "as listed in Annexes 2 and 2A to this Deliberation". In other words, effect has to be given to the terms of Annex 2, as well as to Annex 2A; Annex 2, paragraph (b)(i) expressly excludes from being transferred liabilities meeting the criteria stipulated in that sub-paragraph. If a liability did not meet those criteria, albeit that such fact was not known at the time of the August decision, the better argument, in my view, is that there was no transfer of the liability at all, notwithstanding that the amount of the liability (although no specific reference to the actual debt) appeared in the "provisional" balance sheet in Annex 2A. It was clearly envisaged that further adjustments would be made to the items in such balance sheet, as indeed they were, pursuant to the 11 August resolutions, no doubt after further investigations whether by the directors or PricewaterhouseCoopers.

(ii) It follows that I do not consider that it is correct to characterise the December decision as "re-writing history" as Sales LJ does in paragraph 47 below.

(iii) I cannot agree with Sales LJ's alternate hypothesis (as set out in paragraph 51 below) that the appellants have the better of the argument that the December decision operates as a re-transfer. Even on his stipulated hypothesis, I do not see how, viewed in the context of the full December decision (i.e. including the recitals and points (a) and (b), "the only possible interpretation of point (c) of the December decision ….. is a transfer back of the Oak liability from Novo Banco to BES" or that "the direction for transfer back is clear". Like Moore-Bick LJ, I consider that the instruction to adjust the accounts to reflect what the directors regarded as having actually happened (i.e. no transfer at all) is not a sufficient basis on which to hold that the effect of the decision was in reality to transfer the Oak liability back to BES.

42. But since all members of the court agree on the appropriate disposition of this appeal, these points of disagreement are not significant.

Lord Justice Sales:

43. I agree with Moore-Bick LJ that Novo Banco has the better of the argument to the effect that at the relevant date (26th February 2015, when these proceedings were commenced) it was not a party to an agreement that these claims should be determined by the English courts and that accordingly the appeal should be allowed, essentially for the reasons given by him. I agree with him that Novo Banco should be granted permission to amend its notice of appeal to argue that the December decision was a reorganisation measure and that Novo Banco should be refused permission to amend its notice of appeal in order to seek to rely in the further alternative upon the decisions of September and December 2015. I add a judgment of my own to explain more fully why I agree with Moore-Bick LJ's reasoning regarding the effect of the

August decision, in accordance with the declaration regarding that effect issued by Banco de Portugal in the December decision, and also to explain why, even if that analysis were not correct, I think Novo Banco still has the better of the argument regarding the effect of those decisions in relation to the question of jurisdiction.

44. The August decision was a reorganisation measure which was given effect in English law from the date on which it was promulgated (3rd August 2014) by virtue of regulation 5 of the 2004 Regulations. There were two bases in EU law why the United Kingdom was obliged to give it effect on that date: Article 3 of the Reorganisation Directive and Article 66 of the EBRRD. Under both provisions, the United Kingdom was obliged to give immediate effect in its law to the transfer of rights and liabilities of BES (including the Oak liability) to Novo Banco under the August decision, and regulation 5 satisfied that obligation. Accordingly, if a debtor in respect of a loan made to him by BES under an agreement governed by English law but transferred to Novo Banco by the August decision wanted to make repayment on 4th August 2014, he would have known that according to the law of the agreement he should pay Novo Banco.

45. Similarly, on 4th August 2014 everyone knew that it was Novo Banco who was the debtor in respect of the Oak liability. This was the effect of point 2 of the August decision read with Annex 2A. The August decision did not simply state that rights and liabilities falling within particular definitions were transferred, leaving it to a process of investigation of the underlying facts to determine of any particular right or liability whether it fell within any relevant definition and hence was transferred; it specifically said that the assets and liabilities transferred were as reflected in Annex 2A. Thus on proper analysis the August decision both stated the categories of assets and liabilities which in principle would be transferred and also specifically directed which particular assets and liabilities were in fact transferred, which included the Oak liability as a relevant liability set out in Annex 2A. This might have been important information if, for example, the creditors in respect of that liability wished to sell it or part of it in the market on that day or if the creditors needed to know whether to treat that liability as recoverable (or not) in their own records or financial statements as at that time.

46. In this way, on 3rd August 2014, by virtue of the Reorganisation Directive and the EBRRD, the August decision entered the EU law regime and took effect under and subject to that regime. The principles of legal certainty and protection of legitimate expectation are part of EU law. They affect the interpretation and effect of EU legislation and also the implementation of measures taken by Member States within the scope of EU law, such as reorganisation measures of the kind taken by Banco de Portugal in this case. For discussion of the principle of protection of legitimate interests within the reorganisation regime, albeit in a somewhat different context, see the judgment of the CJEU in the *Kotnik* case at paras. 61-80.

47. In my view, this is an important dimension of EU law in the present context. It means that although Banco de Portugal has power under Portuguese law to re-write history - which it exercised by issuing the December decision to state that the August decision, as from its inception, did not have the effect of transferring the Oak liability – there are constraints deriving from EU law upon that power which would protect the legitimate expectations of creditors and debtors of BES and Novo Banco if, in the period between the August decision and the December decision (or any other decision which might be issued by Banco de Portugal), they had in fact acted on the faith of

what was stated in the August decision. Thus, for example, if a debtor of BES in respect of a loan which was then transferred to Novo Banco had repaid that debt by transferring funds to Novo Banco on 4th August 2014, Banco de Portugal could not thereafter issue a new decision to declare that the loan had after all never been transferred to Novo Banco and thereby reinstate the original debt owed to BES.

48. When this effect of EU law is taken into account, I think it supports the interpretation given by Moore-Bick LJ to Article 3 of the Reorganisation Directive at paragraphs 27-28 above. That is to say, that it is as at the relevant date when the issue of the effect of the August decision arises (i.e. as at 26th February 2015, when these proceedings were commenced) that one should ask what is the effect of the August decision in Portuguese law. That question falls to be answered by reference to the December decision, which was valid in Portuguese law to declare the effect of the August decision. There has been no suggestion in these proceedings that any relevant legitimate expectation was defeated or that the EU principle of legal certainty was infringed by Banco de Portugal when it issued the December decision, in any way which could deprive that decision of having the effect given to it by Portuguese law.

49. I think this approach to the interpretation of Article 3 is the most satisfactory one. It gives effect to the ordinary meaning of the words used in Article 3(2) ("… reorganisation measures shall be applied in accordance with the laws, regulations and procedures applicable in the home Member State …") and to the objective apparent from the Reorganisation Directive and the EBRRD that control of the reorganisation of a credit institution in difficulties should be in the hands of the home Member State, while at the same time the legitimate interests of borrowers and creditors are given appropriate protection. Since there is protection for legitimate interests in this way under general principles of EU law, this interpretation of the Reorganisation Directive does not undermine the effect of Article 40(7) of the EBRRD, since the limitations upon re-transfers of assets and liabilities set out there are directed to the same end.

50. Even if a narrower interpretation were given to Article 3, so that the validity and effect of the August decision reorganisation measure in Portuguese law was tested by reference to the date on which it was promulgated and thereafter its effect under the EU regime was governed by EU law alone, I consider that Novo Banco would still have the better of the argument on the issue of jurisdiction. In my opinion, the analysis then would be as follows: the August decision effected a transfer of the Oak liability to Novo Banco which for the purposes of the EU regime could not be subject to later reinterpretation, despite what Portuguese law says; but on that hypothesis, the only possible interpretation of point (c) of the December decision for the purposes of application of the EU regime would be that the December decision was itself a reorganisation measure involving a transfer back of the Oak liability from Novo Banco to BES. It is true that Banco de Portugal has, for reasons of its own, been at pains to try not to characterise it in that way, but the direction for transfer back is clear and all other Member States would be required to recognise and give effect to it as such, pursuant to both Article 3 of the Reorganisation Directive and Article 66 of the EBRRD.

51. In that regard, I think that each of the conditions in Article 40(7) of the EBRRD was satisfied, so that the re-transfer of the Oak liability was permissible. (Of course, it would be sufficient for the purposes of Novo Banco's alternative argument if either one of the conditions was satisfied). As to the condition stated in sub-paragraph (a) of

Article 40(7), I consider that the August decision included a sufficiently explicit statement that any liabilities (that is, including the Oak liability) could be transferred back to BES. The August decision thus gave fair warning that this could happen. As to the condition in sub-paragraph (b), I consider that Banco de Portugal was entitled to proceed under that provision since it believed in good faith that the Oak liability had been transferred to Novo Banco by the August decision on the basis of a mistake, whereas in fact it should have been removed from the liabilities so transferred because Oak acted on behalf of GSI. If the correctness of Banco de Portugal's assessment to this effect is to be challenged, that should be by way of judicial review proceedings in Portugal as the home Member State.