



Claim No: FL-2018-000010

Neutral Citation Number: [2019] EWHC 737 (Ch)

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**CHANCERY DIVISION**

**FINANCIAL LIST**

Rolls Building  
7 Rolls Building  
Fetter Lane  
London, EC4A 1NL

Monday 1 April 2019

Before :

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

Between:

**WINTERBROOK GLOBAL OPPORTUNITIES FUND**

Claimant

- v -

**(1) NB FINANCE LIMITED**  
**(2) NOVO BANCO, S.A.**  
**(3) THE BANK OF NEW YORK MELLON**

Defendants

**Mr Tom Smith, QC** (instructed by **Boies Schiller Flexner (UK) LLP**) for the **Claimant**  
**Mr Daniel Bayfield, QC** and **Mr Ryan Perkins** (instructed by **Linklaters LLP**) for the **First**  
**and Second Defendants**

**Mr Andrew de Mestre** (instructed by **Hogan Lovells International LLP**) for the **Third**  
**Defendant**

Hearing date: 6 February 2019

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Mr Justice Marcus Smith:**

**A. THE NOTES AND THE PARTIES**

1. The First Defendant, NB Finance Limited (“NB Finance”), is the current issuer (the “Issuer”) of two series of debt securities, respectively the “Series 40 Notes” and the “Series 56 Notes”, collectively the “Notes”. The Series 40 Notes were issued in December 2005 in an aggregate principal amount of €250 million. They fall due in February 2035. The Series 56 Notes were issued in July 2009 in an aggregate principal amount of €300 million. They fall due in July 2043.
2. The documentation of the Notes is substantially the same for each series. The Series 40 Notes were issued pursuant to a Principal Trust Deed originally dated 3 February 1997, as amended and re-stated by the Seventh Supplemental Trust Deed dated 6 August 2004. The terms and conditions of the Series 40 Notes, contained in a document entitled “Final Terms” (the “Series 40 Conditions”), are dated 21 December 2005.
3. The Series 56 Notes were issued pursuant to the same Principal Trust Deed, but as amended and restated or supplemented by the Twelfth Supplemental Trust Deed dated 18 February 2009. The terms and conditions of the Series 56 Notes (the “Series 56 Conditions”) are contained in a prospectus dated 18 February 2009.
4. There is no material difference between the Series 40 Conditions and the Series 56 Conditions. For the purposes of this Judgment, I shall not differentiate between the Series 40 Notes and the Series 56 Notes. I refer to and quote from the Series 40 Conditions, and shall refer to them simply as the “Conditions”.
5. By Condition 22, the Notes are governed by English law, and that is the relevantly applicable law.
6. The Notes were originally issued by BES Finance Ltd (“BES Finance”). Pursuant to a guarantee (the “Guarantee”), the Notes were guaranteed by Banco Espirito Santo SA (“Espirito Santo”). As I have stated, the present or current issuer of the Notes is NB Finance. The present or current guarantor under the Guarantee is the Second Defendant, Novo Banco SA (“Novo Banco”).
7. The Third Defendant, the Bank of New York Mellon (“BONYM”), is the trustee in relation to the Notes (the “Trustee”). The original Trustee was JP Morgan Trustee and Depository Company Limited.
8. The Claimant – Winterbrook Global Opportunities Fund (“Winterbrook”) – is the beneficial owner of some of the Notes. As is common in note issues such as these, the Notes were issued in global note form, and held by a common depository on behalf of the relevant clearing systems, Euroclear and Clearstream. Under this structure, the securities are issued in global form and held by the depository for the clearing system. Investors hold their interests through accounts at the clearing systems or indirectly through custodians who have accounts at the clearing systems. Winterbrook, as I understand it, holds its Notes indirectly.

9. The circumstances in which NB Finance and Novo Banco came to be involved in the Notes are important:
  - (1) NB Finance succeeded BES Finance as Issuer by resolutions of the holders of the Notes with effect from July 2015.
  - (2) Novo Banco became guarantor under the Guarantee by virtue of Portuguese legislation made pursuant to the European Bank Recovery and Resolution Directive, which is described further below.
10. The Portuguese legislation as it relates to the transfer of the Guarantee is described in a decision of the Supreme Court in *Goldman Sachs International v. Novo Banco SA* [2018] UKSC 34 (“*Goldman Sachs*”). That decision concerns the transfer of an altogether different obligation from Espirito Santo to Novo Banco, unrelated to the Notes save that Winterbrook relies upon this obligation as the basis for its contention that payment of the Notes can be accelerated by reason of certain “Events of Default” under Condition 10. I shall refer to this otherwise unrelated obligation as the “Oak Loan”.
11. Accordingly, this Judgment deals with the following matters in the following order:
  - (1) Section B below describes the legal mechanism by way of which the Guarantee and the Oak Loan transferred (or, as the case may be, did not transfer) from Espirito Santo to Novo Banco. Section B also describes the Oak Loan and its relationship with Espirito Santo and Novo Banco. Section B borrows extensively from the judgment of Lord Sumption, who gave the judgment of the Supreme Court in *Goldman Sachs*.
  - (2) Section C describes Winterbrook’s claim in these proceedings, the nature of the present applications before me and the essential issue that they give rise to.
  - (3) Section D resolves and determines that issue.

The manner in which the applications are disposed of is briefly stated in Section E.

## **B. THE OAK LOAN AND THE PORTUGUESE TRANSFER PROVISIONS**

12. The financial crisis of 2007-2008 revealed systemic weaknesses in the European banking system and the lack of an adequate legal framework for rescuing failing banks in some member states of the European Union. As a result, the European Bank Recovery and Resolution Directive, Directive 2014/59/EU of 15 May 2014 (the “EBRRD”) established a framework for the recovery and resolution of credit institutions and investment firms. The EBRRD required member states to confer on their domestic “Resolution Authorities” (usually the central bank of that member state) certain minimum powers or “tools” for reconstructing the businesses of failing credit institutions and investment firms. One of the tools was the “bridge institution tool”, which required designated national Resolution Authorities to have the power to transfer to a “bridge institution” any assets, rights or liabilities of a failing credit institution.
13. On 30 June 2014, Oak Finance Luxembourg SA (“Oak”) entered into a facility agreement with Espirito Santo under which it (Oak) agreed to lend approximately US\$835m. The facility agreement was governed by English law and provided for the English courts to have exclusive jurisdiction in respect of “any dispute arising out of or in conjunction with

this Agreement”. The entire facility was drawn down on 3 July 2014. As I have stated, I refer to this facility as the Oak Loan.

14. The Oak Loan is only related to the Notes through Winterbrook’s claim in these proceedings. As I have noted, Winterbrook contends that certain Events of Default under the Notes have been triggered by reason of certain events relating to the Oak Loan. It is therefore necessary to consider these events:
  - (1) The first scheduled repayment of the Oak Loan, amounting to US\$52,860,814.22 fell due on 29 December 2014. But it became clear shortly after the Oak Loan was concluded and drawn down that Espirito Santo was in serious financial difficulties. On 30 July 2014, Espirito Santo reported losses for the first half of 2014 exceeding US\$3.5 billion. On the following day, Espirito Santo applied to Banco de Portugal, the Central Bank of Portugal, for emergency liquidity assistance.
  - (2) The Banco de Portugal is the designated Resolution Authority for Portugal for the purpose of the EBRRD, which has been transposed into Portuguese law (*Regime Geral das Instituições de Crédito e Sociedades Financeiras*, the “Portuguese Banking Law”). On 3 August 2014, the Banco de Portugal decided to invoke the “bridge institution tool” in order to protect the depositors of Espirito Santo. By a “Deliberation” published on that date, the Banco de Portugal incorporated Novo Banco to serve as the bridge institution, and transferred to it the assets and liabilities of Espirito Santo as specified in Annexes 2 and 2A to the Deliberation.
  - (3) Annex 2 specified all assets and liabilities recorded in Espirito Santo’s accounts, with certain exceptions. According to the Portuguese Banking Law, no liability could be transferred to a bridge institution if it was owed to an entity holding more than 2% of the original credit institution’s share capital. An exception to that effect was accordingly included as paragraph (b)(i)(a) of Annex 2 of the Deliberation. Annex 2A was the balance sheet of Espirito Santo as at 30 June 2014 adjusted to the time of transfer to show what was then understood to be the value of the transferred assets and liabilities. The liability constituting the Oak Loan was not mentioned there by name, but it was included in the totals for liabilities purportedly transferred.
  - (4) Following the Deliberation, the Banco de Portugal made a number of further decisions adjusting the transfer of both assets and liabilities as the investigation into Espirito Santo’s affairs proceeded. One of these concerned the Oak Loan. On 22 December 2014 – that is, a week before the due date for the first scheduled repayment of the Oak Loan (see paragraph 14(1) above) – the Banco de Portugal reached the view that although it had originally been thought that the Oak Loan was eligible for transfer to Novo Banco, subsequent investigations suggested that:
    - (a) Oak had entered into the Oak Loan on behalf of Goldman Sachs; and
    - (b) Goldman Sachs held more than 2% of Espirito Santo’s share capital.

In these circumstances, the Banco de Portugal decided that Espirito Santo’s liability under the Oak Loan was not transferred to Novo Banco and that this decision was effective as of 3 August 2014, i.e. the date of the Deliberation (see paragraph 14(2) above). I shall refer to this decision as the “22 December 2014 Decision”.

- (5) Although Goldman Sachs objected to this, the Banco de Portugal maintained the 22 December 2014 Decision. There are, currently, administrative law proceedings in Portugal challenging the 22 December 2014 Decision. These proceedings have yet to be resolved.
15. *Goldman Sachs* concerned a claim by the assignee of the benefit of the Oak Loan (Goldman Sachs, having taken an assignment from Oak) against Novo Banco, contending that – by reason of the transfer effected by the 3 August 2014 Deliberation – Novo Banco was liable to repay the Oak Loan. The specific question before the courts on this occasion was whether the English courts had jurisdiction. Hamblen J held that they did:
- (1) The Deliberation had been sufficient to transfer the Oak Loan from Espirito Santo to Novo Banco.
- (2) By reason of the transfer, Novo Banco became party to the jurisdiction clause described in paragraph 13 above, and so the English courts had (pursuant to that clause) exclusive jurisdiction.
- (3) The re-transfer of the Oak Loan pursuant to the 22 December 2014 Decision could not affect the question of jurisdiction. The English courts had jurisdiction by virtue of the combined effect of the jurisdiction clause and the Deliberation, and the effect of the 22 December 2014 Decision would be a matter for trial in the action before the English courts.
16. This analysis was rejected by the Court of Appeal and the Supreme Court. In the Supreme Court, Lord Sumption stated at [28]:
- “...I reject the proposition, which was fundamental to both the Judge’s analysis and the appellant’s case, that the effect of the August decision can be recognised without regard to the December decision. On the face of it, the December decision was not an interpretation of the August decision or an amendment of it, retrospective or otherwise. Nor was it a retransfer of a liability previously transferred to Novo Banco. It was a ruling that under the terms of the [Portuguese Banking Law] and [the August Deliberation], the Oak [Loan] had never been transferred. But, like the courts below, I do not think that it matters what the correct analysis of the December decision is, provided it is accepted (as it is) that as a matter of Portuguese law it is conclusive of that point unless and until annulled by a Portuguese administrative court. It follows...that an English court must treat the Oak [Loan] as never having been transferred to Novo Banco. It was therefore never party to the jurisdiction clause.”
17. The fact that Hamblen J took a different view of this question is important in terms of explaining what then happened in Portugal. Because the consequence of his judgment was that the Oak Loan was transferred by the August Deliberation, issues regarding Novo Banco’s liability under the Oak Loan fell to be determined by an English court, applying English law (including its conflict of law rules). As a result of this, the Portuguese authorities made a series of further decisions, notably a decision dated 15 September 2015 (the “September 2015 Decision”) and three decisions dated 29 December 2015 (the “December 2015 Decisions”). The September 2015 Decision and the December 2015 Decisions stated that if Espirito Santo’s liabilities under the Oak Loan had been transferred to Novo Banco by virtue of the Deliberation, those liabilities were to be re-transferred from Novo Banco back to Espirito Santo. Both the September Decision and the December Decisions purported to have retrospective effect. Thus:

- (1) The September 2015 Decision provided that “this transfer...is effective from 3 August 2014”.
  - (2) The first December 2015 Decision provided that the Oak Loan was “retransferred from Novo Banco to [Espirito Santo] with effect from 8:00pm on 3 August 2014”, and the other December 2015 Decisions were to similar effect.
18. Just to complete the picture, Espirito Santo has gone into liquidation and its authorisation to carry out banking activities has been revoked. It defaulted on the Oak Loan. (Indeed, the proceedings before the Supreme Court had as their purpose the recovery of the loan from Novo Banco.)

### **C. WINTERBROOK’S CLAIM AND THE PRESENT APPLICATIONS**

19. By these proceedings, Winterbrook seeks declarations that various Events of Default have been triggered under Condition 10(A) of the Notes. The condition is the same for both Notes, and provides as follows:

“If any one or more of the following events (each an “Event of Default”) shall occur and be continuing:

- (i) default is made in the payment of any principal or interest due in respect of the Notes or any of them and such default continues, in the case of principal, for a period of five Portuguese Business Days or, in the case of interest, for a period of 10 Portuguese Business Days; or
- (ii) the Issuer or the Bank (where the Issuer is BES Finance) fails to perform or observe any of its other obligations in respect of the Notes or under the Trust Deed and (except where, in the opinion of the Trustee, such default is not capable of remedy where no such continuation or notice as is hereinafter referred to will be required) such failure continues for the period of 30 days (or such longer period as the Trustee may permit) after notice has been given to the Issuer or, as the case may be, the Bank requiring the same to be remedied; or
- (iii) the repayment of any indebtedness owing by the Issuer or by the Bank (where the Issuer is BES Finance) is accelerated by reason of default and such acceleration has not been rescinded or annulled, or the Issuer or Bank (where the Issuer is BES Finance) defaults (after whichever is the longer of any originally applicable period of grace and 14 days after the due date) in any payment of any indebtedness provided that no such event shall constitute an Event of Default unless the indebtedness whether alone or when aggregated with other indebtedness relating to all (if any) other such events which shall have occurred shall exceed US\$10,000,000 (or its equivalent in any other currency or currencies) or, if greater, an amount equal to one percent of the Bank’s Shareholders’ Funds; or
- (iv) any order shall be made by any competent court or resolution passed for the winding up or dissolution of the Issuer or the Bank (where the Issuer is BES Finance) (other than for the purpose of an amalgamation, merger or reconstruction approved by the Trustee or by an Extraordinary Resolution of the Noteholders); or
- (v) the Issuer or the Bank (where the Issuer is BES Finance) shall cease to carry on the whole or substantially the whole of its business (other than for the purpose of an amalgamation, merger or reconstruction approved by the Trustee or by an Extraordinary Resolution of the Noteholders); or

- (vi) the Issuer or the Bank (where the Issuer is BES Finance) shall stop payment or shall be unable to, or shall admit inability to, pay its debts as they fall due, or shall be adjudicated or found bankrupt or insolvent by a court of competent jurisdiction or shall make a conveyance or assignment for the benefit of, or shall enter into any composition or other arrangement with, its creditors generally; or
- (vii) a receiver, trustee or other similar official shall be appointed in relation to the Issuer or the Bank (where the Issuer is BES Finance) or in relation to the whole or a substantial part of the assets of either of them or a temporary manager of the Bank is appointed by the Bank of Portugal or an encumbrancer shall take possession of the whole or a substantial part of the assets of the Issuer or the Bank (where the Issuer is BES Finance), or a distress or execution or other process shall be levied or enforced upon or sued out against the whole or a substantial part of the assets of either of them and in any of the foregoing cases it or he shall not be discharged within 60 days; or
- (viii) the Bank sells, transfers, lends or otherwise disposes of the whole or a major part of its undertaking or assets (including shareholdings in its Subsidiaries or associated companies) and such disposal is substantial in relation to the assets of the Bank and its Subsidiaries as a whole, other than selling, transferring, lending or otherwise disposing on an arm's length basis; or
- (ix) except where the Issuer has been substituted as principal debtor pursuant to Condition 18, the Issuer (where the Issuer is BES Finance) ceases to be a Subsidiary wholly owned and controlled, directly or indirectly, by the Bank; or
- (x) (where the Issuer is BES Finance) the Guarantee is terminated or shall cease to be in full force and effect,

then the Trustee at its discretion may, and if so requested in writing by the holders of not less than 20 percent of the nominal amount of the Notes then outstanding or if so directed by an Extraordinary Resolution of the Noteholders shall (subject in each case to being indemnified to its satisfaction), give notice to the Issuer that the Notes are, and they shall accordingly thereby forthwith become, immediately due and repayable at their Early Redemption Amount (as described in Condition 7(e)) together with accrued interest (as provided in the Trust Deed) provided that, in the case of any such Events of Default other than those described in subparagraphs (i) and (iv) above, the Trustee shall have certified to the Issuer that such Event of Default is in its opinion material prejudicial to the interests of the Noteholders.”

20. Condition 10 is thus a version of a provision commonly found in note conditions, whereby payment of the notes can be accelerated where certain events occur which affect the financial standing or ability to pay of the issuer and/or the guarantor of the issuer's obligations.

21. In these proceedings, Winterbrook seeks the relief described in paragraphs 34 and 35 of its written submissions:

“34. Winterbrook is the beneficial owner of 20% of the outstanding Series 56 Notes. As a result of the occurrence of the Event of Default, Winterbrook is therefore in a position to cause a request to be given to [BONYM] as Trustee, pursuant to Conditions 10(A) and 19(a) to take steps to accelerate and enforce the Series 56 Notes (subject to the Trustee being indemnified to its satisfaction). However, Winterbrook also recognises that the present case is complex and unusual, as a result of the unusual nature of the decisions made by the [Banco de Portugal], and that the occurrence of an Event of Default is disputed by [NB Finance] and Novo Banco.

35. In these circumstances, Winterbrook accepts that it is not realistic to expect the Trustee to take action without the question of whether or not an Event of Default has occurred being determined by the Court. It has therefore commenced the present proceedings for declaratory relief in order to determine whether or not an Event of Default has occurred under the Notes. This will in turn then determine the question of whether a request should then be made to the Trustee to accelerate the Series 56 Notes. [NB Finance] and Novo Banco have been joined to the proceedings as they are the parties contending that no Event of Default has occurred and who have an obvious interest in this question.”
22. The Trustee, BONYM, was before the court in order better to understand the claims being advanced by Winterbrook and hence its obligations as Trustee.
23. The hearing before me was not the hearing of Winterbrook’s claim for a declaration but the hearing of two applications. The first was NB Finance’s and Novo Banco’s application to strike out the claim form and particulars of claim pursuant to CPR 3.4 and/or for summary judgment pursuant to CPR 24.2 on the basis that Winterbrook’s claim has no prospect of success. The second was Winterbrook’s application to amend its particulars of claim.
24. The parties were all agreed that NB Finance’s and Novo Banco’s application should proceed as if Winterbrook’s proposed amendments had been made. If, on this basis, the application succeeded, then the claim form and particulars of claim would be struck out (or summary judgment entered) and Winterbrook’s application would be dismissed. Conversely, if, on this basis, the application to strike out the claim form and particulars of claim and/or for summary judgment failed, then the application would have to be dismissed and Winterbrook’s application to amend would succeed.
25. Accordingly, I will consider the application of NB Finance and Novo Banco in relation to the claim form and particulars of claim as if amended.
26. The Events of Default that it is alleged have occurred are: Condition 10(A)(iii),<sup>1</sup> Condition 10(A)(v)<sup>2</sup> and Condition 10(A)(x).<sup>3</sup> In each case, however, the trigger for these Events of Default was the failure to honour the obligations under the Oak Loan. Although it was put in far greater detail, and with great elegance, the essence of Winterbrook’s claim was that this failure could be attributed – at least in part – to Novo Banco. It is, accordingly, not necessary to consider each individual Event of Default specifically. The detail is actually irrelevant to the essential point, which is whether or not it is arguable that the failure in relation to the Oak Loan can, in any way, be attributed to Novo Banco. It is, therefore, to the resolution of this question that I now turn.

#### **D. A QUESTION OF ATTRIBUTION**

27. It is significant that Winterbrook’s claim was made before the Supreme Court’s decision in *Goldman Sachs*. The Supreme Court’s decision has made straightforward what might have been significantly harder questions had the approach of Hamblen J prevailed. In my judgment, Winterbrook’s claim is unarguable and must be struck out. I have reached this conclusion for the following reasons:

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<sup>1</sup> Paragraph 47 of the draft Amended Particulars of Claim.

<sup>2</sup> Paragraphs 43 and 43A of the draft Amended Particulars of Claim.

<sup>3</sup> Paragraphs 40-41 of the draft Amended Particulars of Claim.



- (1) Although the Supreme Court in *Goldman Sachs* was looking to the question of whether the English courts had jurisdiction pursuant to the jurisdiction clause described in paragraph 13 above, I do not see how I can distinguish the reasoning of the Supreme Court for the purpose of determining how the Oak Loan is to be treated for the purposes of these applications.
- (2) On the basis of the Supreme Court’s reasoning, the Deliberation (described in paragraph 14(2) above) and the 22 December 2014 Decision (described in paragraph 14(4) above) cannot be separated and are of single effect. That is the conclusion of Lord Sumption at [28] of *Goldman Sachs*, quoted in paragraph 16 above.
- (3) On this basis, the Oak Loan was never transferred away from Espirito Santo and never affected, in any way, Novo Banco. That, as the Supreme Court found, is the combined effect of the Deliberation and the 22 December 2014 Decision. As Lord Sumption stated, I must treat the Oak Loan “as never having been transferred to Novo Banco”.
- (4) I recognise that the 22 December 2014 decision is being challenged in Portugal. That fact, however, alters nothing:
  - (a) Until varied or overturned by the Portuguese courts, the Deliberation and the 22 December 2014 Decision stand.
  - (b) If – hypothetically speaking – the 22 December 2014 Decision were to be overturned in Portugal, then that might change matters. Winterbrook adduced evidence from Portuguese lawyers suggesting that this would indeed be the likely outcome and invited me to proceed on the basis that this evidence (being evidence of fact) had to be accepted by me as being the case, given the nature of NB Finance’s and Novo Banco’s application.
  - (c) I accept that on, a strike out/summary judgment application, the issues are to be determined on the basis of the claimant’s pleadings, even if the facts pleaded are disputed by the defendant. However, it is important to be clear as to what the factual issues are. The factual question here is not what may or may not occur in future in the Portuguese administrative law proceedings. It is for the Portuguese courts to determine these matters, not for the English court to anticipate, based on Portuguese expert opinion, what (as a question of fact) the Portuguese courts may or may not do in the future. Put shortly, this is not a question of fact, but a question of recognising a foreign (here: Portuguese) legal determination. That determination stands unless and until varied or set aside in Portugal. That was the clear holding of the Supreme Court in *Goldman Sachs*.
- (5) As I have said, I am prepared to accept that were the 22 December 2014 Decision to be set aside or varied in Portugal that might change matters. But I find this to be irrelevant to the present applications:
  - (a) The consequences of a decision to set aside or vary the 22 December 2014 Decision are, inevitably, uncertain. In the first place, a great deal would turn, in my judgment, on precisely what the Portuguese administrative court

decided, not only as regards the 22 December 2014 Decision, but also as regards the September 2015 Decision and the December 2015 Decisions.

- (b) These decisions, as I have described (see paragraph 17 above), were made as a consequence of Hamblen J’s decision at first instance in *Goldman Sachs*. On their face, they seek to achieve exactly the same end as the Deliberation and the 22 December 2014 Decision – that is, to ensure that the Oak Loan remained at all times and for all purposes with Espirito Santo.
  - (c) Given the Supreme Court’s decision in *Goldman Sachs*, it seems to me unnecessary and unwise to consider what that the effect of these decisions might be in the event of the 22 December 2014 Decision being varied or set aside, particularly given the unknown future outcome of the Portuguese administrative proceedings.
- (6) The upshot, however, is that when the Deliberation was made on 3 August 2014:
- (a) The Oak Loan did not transfer to Novo Banco, but remained with Espirito Santo; but
  - (b) The Guarantee did transfer from Espirito Santo to Novo Banco.
- (7) The Conditions must be read in this light. The Conditions use, at various points, the terms “Issuer”, “Guarantor” and “Bank”. As at the time the Notes were originally issued, the Issuer was BES Finance; and the Guarantor and Bank was Espirito Santo. However:
- (a) The Issuer was changed by noteholder resolution from BES Finance to NB Finance with effect from July 2015 and, from that date, all references to “Issuer” must be to NB Finance.
  - (b) The “Guarantor” and “Bank” ceased, with effect from 3 August 2014, to be Espirito Santo and, from that date, referred to Novo Banco.

On this basis, it is impossible to see, as a matter of construction or interpretation of the Conditions, how Espirito Santo’s default in relation to the Oak Loan (which occurred after 3 August 2014) could give rise to any kind of default on the part of the “Guarantor” or “Bank” when this was, after 3 August 2014, Novo Banco and not Espirito Santo.

In short, I consider the proposition that the default in relation to the Oak Loan can in some way be attributed to Novo Banco to be unarguable.

28. The Oak Loan is, as I noted in paragraph 10 above, distinct and separate from the Notes and the Conditions. Winterbrook’s attempt to find a nexus between them fails, for the reasons that I have given.

## **E. DISPOSITION**

29. It follows that Winterbrook’s application to amend fails; and that NB Finance’s and Novo Banco’s application to strike out the claim form and particulars of claim pursuant to CPR 3.4 and/or for summary judgment pursuant to CPR 24.2 succeeds.