Neutral Citation Number: [2018] EWHC 1389 (Comm)

Case No: CL-2017-000341

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
SHORTER TRIALS SCHEME

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 June 2018

Before:

THE HON. MR. JUSTICE PICKEN

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Between:

(1) MEHMET OMER ARIF ARAS
(2) SINAN SAHINBAS
(3) TEMEL GUZELOGLU

Claimants

- and -

NATIONAL BANK OF GREECE S.A.

Defendant

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Ben Valentin QC (instructed by **White & Case LLP**) for the **Claimants**
Matthew Parker (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing date: 30 April and 1-2 May 2018

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Judgment Approved

THE HON. MR. JUSTICE PICKEN:

Introduction

1. The Claimants are senior executives of QNB Finansbank AS ('Finansbank'), which is apparently one of the largest banks in Turkey. The First Claimant, Dr Aras, is its Chairman and one of its co-founders. The Second Claimant, Mr Sahinbas, is its Vice Chairman and a former Chief Executive Officer. The Third Claimant, Mr Guzeloglu, is its current Chief Executive Officer.

2. This case concerns the Claimants' entitlement to a fee (the 'Fee') which they contend became payable by the Defendant, National Bank of Greece SA ('NBG'), the second

largest bank in Greece by market capitalisation, under three agreements, each described as an *"Incentive Fee Agreement"*, which they separately (but on materially identical terms) entered into with NBG on 30 December 2011 (the 'IFAs').

3. The purpose of the IFAs was described in Clause 1 (*"BACKGROUND"*) as being:

"… to incentivize the Executive to use his best efforts to dispose of NBG's interest in the Finansbank Group, directly or indirectly, by providing the Executive with an opportunity to earn an incentive fee (the 'Fee') linked to such disposal on the terms and conditions set out in this Agreement."

4. Under the IFAs, as explained in more detail later, it was agreed that the Fee would potentially become payable in the event of the disposal by NBG of more than 5% of its shares in Finansbank (defined as an *"Exit Event"*).

5. The present dispute comes about by reason of the fact that, on 21 December 2015, NBG entered into an agreement, described as a *"Share Sale and Purchase Agreement"* (the 'SSPA'), under which it agreed to sell its shares in Finansbank to Qatar National Bank SAQ ('QNB'). Upon completion of that sale, on 15 June 2016, QNB paid €2.711 billion to NBG for its shares in Finansbank and the shares were transferred to QNB. Under the SSPA, NBG also agreed separately to sell to QNB the subordinated debt of US$910 million which was due from Finansbank to NBG (the 'Subordinated Debt'), at a price equal to its par value and accrued but unpaid interest.

6. It is common ground that, as a result of the sale of the shares to QNB (if not also the sale of the Subordinated Debt and certain other shares in a related company, Finans Finansal Kiralama AS ('Finans Leasing')), there has been an *"Exit Event"* for the purposes of the IFAs. There is a very real controversy, however, as to when precisely the *"Exit Event"* took place, specifically whether it was on the date when the SSPA was executed (21 December 2015) or on the date when NBG actually disposed of its shares in Finansbank to QNB pursuant to the SSPA (15 June 2016). This is one of the issues which the Court must resolve: the Claimants contend for the former whilst NBG contends for the latter.

7. That issue turns on the proper construction of the IFAs, including certain wording contained in the Appendix to the IFAs which sets out the formula agreed between the parties to work out what (if any) Fee is payable. So, too, do certain related disputes concerning (a) whether the Subordinated Debt should be taken into account in ascertaining Finansbank's value in accordance with that formula, (b) whether consideration received by NBG in respect of shares in Finans Leasing should similarly be taken into account for that purpose and (c) what is the appropriate exchange rate to take in view of the agreed formula contained in the Appendix.

8. These are all matters which I shall come on to address but, as regards (b), I should explain straightaway that, as at the date of the SSPA, besides owning almost the entirety of the shares in Finansbank, NBG also held directly a 29.87% shareholding in Finans Leasing. Although those shares did not form part of the *"Shares"* which were to be sold to QNB under the SSPA, in the negotiation of the sale it had nonetheless been anticipated that those shares would be transferred to Finansbank itself and that QNB would pay NBG for those shares. In the event, however, Finansbank itself paid

NBG €38,886,563.04 for its shares in Finans Leasing, so reducing the price payable by QNB for NBG's shares in Finansbank to €2,711,112,659.23 rather than the €2.75 billion identified in the SSPA. For this reason, it was NBG's position that, in operating the formula contained in the Appendix to the IFAs, the Finans Leasing element should not be included. Mr Valentin QC on behalf of the Claimants did not agree, submitting that the fact that between execution of the SSPA and completion Finansbank acquired NBG's 29.87% shareholding in Finans Leasing meant that those shares, together with Finansbank's own 51% stake in Finans Leasing, also formed part of the assets of Finansbank which QNB acquired from NBG on completion, and so the IFAs should be treated as applying to the Finans Leasing shares also.

9. As to (c) (currency exchange date), this issue arises because, whereas Finansbank's *"Equity Book Value"* (as referred to in the Appendix to the IFAs) was denominated in Turkish Lira, NBG's accounts were denominated in Euros which meant that the sum payable by QNB to NBG in respect of the Shares in Finansbank was payable (and paid) in Euros. In addition, the sum payable by QNB to NBG in respect of the Subordinated Debt was payable (and paid) in US Dollars. Mr Valentin's submission was that the correct date for performing the relevant currency exchange is the date of the relevant *"Equity Book Value"* (30 September 2015), rather than the date of the *"Exit Event"*. Mr Parker on behalf of NBG, on the other hand, argued that the correct equivalent date is the date of the *"Exit Event"*, whenever that was (either 15 June 2016 or on 21 December 2015), and not any earlier date.

10. These are all disputes which need to be resolved. Suffice it to say that, although the Claimants say that they are each entitled to a substantial Fee (over €17 million in the case of Dr Aras and over €5 million in the cases of Mr Sahinbas and Mr Guzeloglu), NBG denies that anything is payable at all.

11. As I have already mentioned, this is a case which, at least in the first instance, turns on the proper construction of the IFAs. The Claimants, however, advance an alternative case that, if they are wrong on the construction issues which arise, then, nonetheless they are entitled to succeed with their claims because NBG is estopped from contending that a Fee is not payable in the light of how NBG conducted itself in advance of the sale to QNB.

12. I shall address both these cases (the construction case and the estoppel case) in what follows. First, however, it is important that I should set out some background in order that the issues can be seen in their proper context. That background is very largely, if not quite exclusively, common ground. As a result, I can essentially take it from the helpful summary in Mr Valentin's written closing submissions. However, the extent to which it is all admissible in relation to the construction-related issues which the Court has to determine is not entirely free from controversy.

Background to the IFAs

The Claimants and Finansbank

13. I start with the Claimants themselves, noting as I do so that Dr Aras and Mr Guzeloglu each gave evidence at trial and that they did so in a straightforward and constructive fashion. So, too, I should observe in the interests of fairness, did Mr

Mylonas, Head of the Office of the Chief Executive Officer, Mr Apostolos Tamvakakis, at the time that the IFAs were entered into and now himself NBG's Deputy Chief Executive Officer.

14. The Claimants have worked together at Finansbank as a team for the last 15 years. They continue to do so to this day: Dr Aras as the Chairman, having co-founded Finansbank in 1987; Mr Sahinbas as the Vice Chairman, having joined Finansbank on graduation in 1990 and, apart from a short spell away in 1997/98, having worked with the bank in various positions in Istanbul and abroad ever since, being appointed Chief Executive Officer and joining the Board in 2003; and Mr Guzeloglu as Finansbank's current Chief Executive Officer, having joined Finansbank in 2004 and become a Board member in 2010.

15. As for Finansbank itself, Dr Aras's evidence was that as at the end of 2017, the Finansbank Group had consolidated assets of approximately US$35 billion under management and approximately US$3.3 billion of equity, with approximately 550 branches in Turkey and more than 14,000 employees serving 6 million or so active customers.

The events leading up to the IFAs

16. Turning to the parties' entry into the IFAs in December 2011, earlier that year Dr Aras was approached by Mr Tamvakakis to discuss NBG's plans to sell part of its shareholding in Finansbank. As part of that process, Mr Guzeloglu and Dr Aras travelled to London in March 2011, together with Mr Anthimos Thomopoulos, then NBG's Chief Financial Officer, on a 'pilot fishing' roadshow to meet with potential investors. Although well received, investors expressed concern at recent decisions of the Turkish Central Bank to increase the capital reserve requirements for Turkish banks (which would impact adversely on their profitability). In the circumstances, NBG decided to postpone the sale of any part of Finansbank, hoping that it would achieve a better price in the future. As part of this strategy, it is clear (indeed, it is stated, in terms, in the IFAs which came to be entered into) that NBG wished to incentivise the Claimants to use their *"best efforts to dispose of NBG's interest in the Finansbank Group"*. So it was that in the second half of 2011 Dr Aras proposed, and Mr Tamvakakis agreed, to enter into the IFAs. This led to a meeting at NBG's headquarters in Athens on 19 December 2011, attended by Dr Aras, Mr Tamvakakis, Mr Agis Leopoulos (NBG's General Manager of International Activities), a lawyer from Allen & Overy (acting for NBG) and Mr Can Verdi (a Turkish qualified lawyer and friend of Dr Aras) and, ultimately, to the entry into the IFAs which are the subject of these proceedings, the Claimants also that same day signing new employment contracts with Finansbank extending their employment until 31 December 2014 on substantially the same terms as their existing contracts.

17. As to what was agreed in the IFAs, taking Dr Aras's agreement as an example (the only differences between his and Mr Sahinbas's and Mr Guzeloglu's being as to the percentages which were agreed and the inclusion of a second sub-paragraph at Clause 3 of Dr Aras's agreement regarding negotiation of additional agreements in good faith), Clause 1 (*"BACKGROUND"*) is in the terms which I have previously described. Clause 2 then contains certain definitions, which include the following:

"***Company*** *means Finansbank A.S.;*

Completion *means, with respect to an Exit Event, the receipt by NBG of the consideration payable with respect to the Exit Event;*

Contingent Consideration *means any consideration arising in respect of an Exit Event that is a disposal the payment of which has been deferred to, or is subject to the satisfaction of a condition or conditions on, a date following the Completion of the Exit Event*;

…

Exit Event *means a Total Exit Event or a Partial Exit Event(s);*

Exit Value *means the aggregate value of the consideration paid in respect of an Exit Event together with any Contingent Consideration, provided that any Fee payable in respect of any Contingent Consideration will only be payable following receipt by NBG of the Contingent Consideration. Where the consideration payable in respect of an Exit Event consists in whole or in part of securities or other non-cash assets, the value of the consideration will be the value attributed to the securities or other assets in the documents associated with the Exit Event;*

Partial Exit Event *means, through one or more transactions, the disposal by NBG to a third party, other than a party within the NBG Group, of more than 5 (five) per cent, but less than 50 (fifty) per cent. of The NBG Holding. For the avoidance of doubt, no Partial Exit Event can occur once NBG has disposed of 50 (fifty) per cent. or more of The NBG Holding but a Partial Exit Event will still occur if NBG has disposed of 50 (fifty) per cent. or more of The NBG Holding if that Partial Exit Event occurs as a direct consequence of an earlier Exit Event (for example, the exercise of a put/call option granted at the time of the earlier Exit Event)*;

The NBG Holding *means NBG's holding of ordinary shares of common stock and the founders' shares in the Company as at the date of this Agreement*;

Total Exit Event *means the disposal by NBG to a third party, other than a party within the NBG Group, of 50 (fifty) per cent or more of The NBG Holding*."

18. Clause 3 (*"AGREEMENT"*) is, then, in the following terms:

"NBG and the Executive agree that following the Completion of an Exit Event the Executive will be entitled to a Fee calculated in accordance with the Appendix and paid in accordance with clause 4 below. For the avoidance of doubt, no fee will be payable if there is no Exit Event.

NBG and the Executive agree and covenant to negotiate in good faith and execute additional agreements to provide the Executive with an opportunity to earn an incentive fee linked to the disposal of the Company's shares in its subsidiaries."

19. This is followed by Clause 4 (*"CALCULATION AND PAYMENT OF THE FEE"*) which provides that the Fee *"will be determined in accordance with the provisions set out in the Appendix to this Agreement"* (Clause 4.1) and which went on to stipulate

that the Fee *"payable under this Agreement will ... be paid in cash and in two instalments"*, the first falling due 30 days after "*Completion*" and the second instalment "*on the first anniversary of Completion*" (Clause 4.2(a)).

20. As for the all-important Appendix, this is headed *"CALCULATION OF THE FEE (BY REFERENCE TO PRICE TO BOOK RATIOS)"* and is in these terms:

"Any fee payable will be determined as the relevant percentage of the Exit Value as determined in accordance with the provisions of this Appendix.

1. Percentage of Exit Value

If:-	*% of Exit Value*
A is 25% less than B or A is between 25% less than B and 20% less than B	*[0.30]*
A is 20% less than B or A is between 20% less than B and 10% less than B	*[0.40]*
A is 10% less than B or A is between 10% less than B and B	*[0.50]*
A is equal to B or A is between B and 10% more than B	*[0.59]*
A is 10% more than B or A is more than 10% more than B	*[0.65]*

Where A and B are determined in accordance with 2 and 3 below respectively.

2. Determination of A

A = C/D

Where:- C is the value of the Company by reference of the Exit Value; and

D is the last Equity Book Value published in accordance with the BRSA standards before the Exit Event.

PROVIDED THAT, and for the avoidance of doubt, no fee will be payable if A is less than 1 (one).

3. Determination of B

B = (E+F)/2

(i) Where: E = G/H

where:- G is the market capitalisation of [YKB(Yapi Kredi Bank)] by reference to the average of the mid-market quotations for the closing price of a share in [YKB] on the Istanbul Stock Exchange over the 90 Dealing Days before the Exit Event; and

H is the last equity Book Value of [YKB] published in accordance with the [BRSA] standards before the Exit Event; and

(ii) Where F = J/K

where:- J is the market capitalisation of [Garanti Bank] by reference to the average of the mid-market quotations for the closing price of a share in [Garanti Bank] on the Istanbul Stock Exchange over the 90 Dealing Days before the Exit Event; and

K is the last Equity Book Value of [Garanti Bank] published in accordance with the BRSA standards before the Exit Event.

If either of YKB or Garanti Bank is delisted following the date of this Agreement, so that it is no longer quoted on the Istanbul Stock Exchange, the relevant bank will be replaced by the next largest publicly-traded private sector bank in Turkey (as determined based on its market capitalisation as at the date of the replacement) for the purposes of the calculation required by this Appendix."

It will be appreciated that it is as regards these provisions, those setting out the formula to be applied to work out what (if anything) is due to the Claimants as a Fee, that the present dispute comes about.

21. As at the date that the IFAs were signed, it is common ground that NBG held 94.81% of the Finansbank shares and, furthermore, that the holder of 5% of the shares had a put option to sell those shares back to Finansbank, which was exercised on 26 September 2014. There is no dispute, either, that by this stage NBG had provided funding to Finansbank represented by US$910 million of subordinated debt.

The sale of Finansbank

22. I come on to deal with events which happened after the parties' entry into the IFAs. These are relevant because they show how the current dispute has arisen. It is important, however, to acknowledge right away that, consistent with the authorities which I shall come on to consider later, as Mr Parker submitted and as ultimately Mr Valentin was essentially driven to accept, evidence as to what occurred after the date of the IFAs is irrelevant to their construction. In particular, whilst the Court may have regard to what has been termed *"commercial common sense"*, this is not to be invoked retrospectively or *"elevated to an overriding criterion of construction"*.

NBG's predicament

23. Although Mr Parker urged caution in relation to subsequent events, as I have just mentioned, he did not quibble with Mr Valentin's description of the background

difficulties which NBG, as a Greek bank, was facing in the period leading up to the sale of Finansbank. The difficulties of Greek banks has been well-documented and, as regards NBG in particular, are summarised in the European Commission's State Aid Decision concerning NBG published on 4 December 2015 (the 'Decision').

24. In summary, as Mr Valentin pointed out based on what is stated in the Decision, whereas the European Central Bank (the 'ECB') had confirmed in October 2014 that the four systemic Greek banks (i.e. Alpha Bank, Eurobank, Piraeus Bank and NBG) would not require additional capital, as a result of the severe political uncertainty which was experienced from December 2014 onwards, large deposit outflows from the Greek banks ensued and their liquidity conditions tightened considerably. As a consequence, the Greek banks (again) became largely dependent on Emergency Liquidity Assistance ('ELA') from the Central Bank of Greece, with the liquidity crisis experienced in the first half of 2015 leading to the closure of the Greek banks, including NBG, between 29 June 2015 and 20 July 2015. This precipitated a dramatic increase in the Greek banks' reliance on ELA which, as it was put in the Decision, *"skyrocketed from nearly zero to a peak of EUR 88.3 billion at the end of July 2015"*. These events, and the introduction of capital controls, also affected the solvency position of the Greek banks, and on 31 October 2015, the Greek Parliament approved legislation which allowed NBG and the other systemic banks to receive support from the Hellenic Financial Stability Fund (the 'HFSF').

25. Two days later, on 2 November 2015, NBG sought authorisation from the HFSF to convoke an EGM to approve a capital increase to cover its capital shortfall, which was between €1.576 billion (on a baseline case) and €4.602 billion (on an adverse case). The next day, 3 November 2015, the HFSF gave its consent.

26. During November 2015, NBG conducted a Greek Offering and an International Offering, which raised respectively €300 million and €457 million, as described in the Decision (albeit with redactions in the version before the Court at trial) as follows:

"(20) On 6 November 2015, the Bank invited its shareholders to the EGM. According to the press release published on 12 November 2015, the objective of that EGM was to approve a capital increase ('the 2015 capital increase') via the issue of new ordinary shares for private investors, comprising a book-building process for investors outside Greece ('the International Offering') and a public offering for investors in Greece (the 'Greek Offering'). The press release also clarified that:

- *the International Offering would be carried out in the context of the overall implementation by the Bank of the capital plan meant to address the capital shortfall revealed by the 2015 CA,*
- *the actions of the capital plan included inter alia the 2015 capital raise and the Liability Management Exercise ('2015 LME') launched by the Bank on 2 November 2015 and completed on 11 November 2015 ('the Private Capital Raising Measures') and*
- *the part of the adverse scenario shortfall that would remain uncovered by the Private Capital Raising Measures and the intended sale of Finansbank*

A.S. would be covered through the issuance of CoCos and new shares to the HFSF (provided that the Bank had raised sufficient capital to address the baseline scenario shortfall from the Private Capital Raising Measures and from any burden-sharing measures taken in light of EU State aid rules prior to the granting of State aid).

That press release therefore made measure A publicly known.

(21) In the presentation of the 2015 CA Results and envisaged capital plan published on 3 November 2015 on the Bank's website, a capital injection by the HFSF is also explicitly mentioned in relation to covering the capital shortfall arising from the adverse scenario of the 2015 CA. …

(22) On 11 November 2015, the Bank announced the preliminary results of the 2015 LME. The LME generated EUR 717 million of capital, as confirmed by the Bank in its 2015 restructuring plan.

…

(24) On 16 November 2015, the Bank announced that the SSM had approved all the capital actions included in the Bank's proposed capital plan which had been submitted to it on 6 November 2015. The positive impact of the 2015 third quarter results of EUR 120 million was also taken into account, thereby reducing the capital shortfall from EUR 1 576 million to EUR 1 456 million in the baseline scenario and from EUR 4 602 million to EUR 4 482 million in the adverse scenario.

…

(25) The book for the International Offering closed on 19 November 2015. […], it was […] covered at a price of EUR 0,02 per share ('the Offer Price') pre-reverse split, or EUR 0,3 per share post reverse split, for an amount of EUR 457 million, representing 31% of the amount of the offering.

…

(28) The Greek Offering was launched on 30 November 2015 and closed on 2 December 2015, and resulted in the raising of an amount of EUR 300 million."

27. Subsequently, on 3 December 2015, NBG submitted a request to the HFSF for a capital injection of €2.706 billion, consisting of €676 million in ordinary shares, and €2.029 billion in Contingent Convertible Bonds ('CoCos'). This was approved on the same date and is described in the Decision as follows:

"(29) On 3 December 2015, the Bank submitted a request to the HFSF for a capital injection of EUR 2 706 million, of which EUR 676 million in ordinary shares and EUR 2 029 million in CoCos. On 3 December 2015, in line with measure A, the HFSF approved its participation in the capital raising process for an amount of EUR 2 706 million. This was the amount necessary to cover the remaining capital shortfall determined by the 2015 CA (EUR 4 602 million), after the mitigating measures approved in the capital plan (EUR 120 million),

the participation of private investors through the International Offering (EUR 457 million), the Greek Offering (EUR 300 million) and the 2015 LME (EUR 717 million), and the application of burden sharing measures (expected to generate EUR 302 million of capital). The HFSF approved the participation in the capital raising process conditional on the Ministry of Finance issuing the Cabinet Act on burden sharing, the State aid approval, the European Stability Mechanism's approval of disbursement for the HFSF and any required regulatory approvals."

28. In conjunction with these events, NBG pursued various measures to restructure its Greek and international operations, in the form of the 2015 Restructuring Plan. As far as Finansbank was concerned, this involved the sale of 100% of stake in Finansbank, as described in the Decision at (66) to (71):

"(66) The 2015 restructuring plan also foresees the full sale of Finansbank as a capital raising action, designed to minimize the need for State aid. The Bank estimates that the sale of Finansbank will reduce NBG's capital needs by between […] and […]. Any potential capital surplus deriving from the sale will be used to repay the CoCos held by the HFSF or the Hellenic Republic, subject to regulatory approval.

(67) On 25 June 2014 Greece gave a commitment that the Bank and its affiliates will implement the 2014 restructuring plan submitted on the same day and gave further commitments ('the 2014 Commitments'), regarding the implementation of the restructuring plan.

(68) The 2014 Commitments have been respected by the Greek authorities and the Bank apart from the commitment requiring Finansbank to issue new shares representing at least 20% of the total shareholding by 30 June 2015.

(69) On 4 December 2015, the Greek authorities submitted an amended list of commitments ('the 2015 Commitments') in line with the 2015 restructuring plan. Amendments were necessary to take into account the additional aid measures received by the Bank (measures A, B and C) and to adapt the 2014 restructuring plan after the extraordinary adverse macro-economic conditions faced by the Bank since December 2014.

(70) First, the Bank has set-up new and more ambitious restructuring targets for its commercial operations in Greece for the maximum number of branches and employees at 31 December 2017 as well as a maximum amount of total costs over the year 2017.

(71) Regarding the Bank's foreign subsidiaries outside Turkey, the Bank will continue implementing the 2014 Commitment to […] deleverage its foreign assets (banking and non-banking) by 30 June 2018. Moreover, Greece has committed that the Bank will sell its entire shareholding in Finansbank. The 100% sale of Finansbank will be signed by […] and closed by […]. Subject to regulatory approval, the Bank will use any surplus of capital coming from the sale of Finansbank to repay the CoCos held by the HFSF or the Hellenic

Republic. The repayment of CoCos will be carried out within a period of […] from the closing of the sale of Finansbank."

29. As Mr Valentin put it, the net effect of these measures was that, on 4 December 2015, the European Commission approved aid for NBG, on the basis of the 2015 Restructuring Plan, in the amount of €2.71 billion. This was announced in the European Commission's Press Release the same day which was entitled *"State aid: Commission approves aid for National Bank of Greece on the basis of an amended restructuring plan"* and which went on to state as follows in the first paragraph:

"In the context of the third economic adjustment programme for Greece, the European Commission has approved additional state aid of €2.71 billion to National Bank of Greece under EU state aid rules, on the basis of an amended restructuring plan."

30. Mr Mylonas confirmed in his evidence that, in the circumstances, although NBG anticipated that it would be required to sell its entire stake in Finansbank at an earlier stage in 2015, it only became a formal commitment on 4 December 2015. Furthermore, it was not in dispute that the formal commitment made by NBG (and underwritten by the Greek State) required that the sale of Finansbank was to be signed up, on a binding basis, by the end of December 2015.

Extension of the Claimants' employment contracts

31. It is necessary now to say something about the Claimants' employment contracts, albeit not very much at this stage since, in truth, this is a matter which is only directly relevant to the Claimants' (alternative) estoppel by convention case.

32. The employment contracts were all due to expire on 31 December 2015 (and so, in the event, shortly after the SSPA was entered into between NBG and QNB) but were extended on 30 July 2015, after a period of negotiations which started in the Spring of 2015, and so at a time when NBG had begun preparing the sale of Finansbank, and in which Mr Mylonas acted on NBG's behalf.

33. The extensions agreed were to 31 December 2017 in the case of Dr Aras and Mr Sahinbas and to 31 December 2018 in the case of Mr Guzeloglu, and the negotiations were conducted by Mr Mylonas (on behalf of NBG). What is most significant, however, from the perspective of the estoppel by convention case, as will appear, is that it was agreed that the employment contracts, as extended, would no longer contain a *"Change of Control"* provision. Specifically, and taking Dr Aras's employment contract by way of example (although the relevant notice period in his contract was more generous than the 8 weeks to 6 months period contained in Mr Sahinbas's and Mr Guzeloglu's employment contracts), Clause 14 (*"TERMINATION OF AGREEMENT"*) contains sub-clause (d) which provides as follows:

"In the event this Agreement is terminated by the Bank serving notice on the Executive in accordance with Clause 14(a)(1), the Executive will be paid: (i) any Retention Payment (net) which would have accrued between the day after the date on which his employment terminated and the Expiration Date; and (ii) an amount equal to the sum of (on a net basis) the applicable base salary that the Executive would have

earned between the day after the date on which his employment terminated and the Expiration Date subject always, in the case of (ii), to a minimum payment of, on a net basis, 12 (twelve) months' applicable base salary (the sum of amounts stated in (i) and (ii) above to be referred to as 'Early Termination Payment')."

Although the present case is not a case in which such notice has been served by Finansbank, what is important is that Clause 14, then, goes on to provide as follows at sub-clause (f):

"In the event of a Change of Control, the Executive shall have the right to terminate this Agreement with 8 (eight) weeks prior written notice to the Bank within 13 (thirteen) months following a Change of Control. In such case the Executive will, notwithstanding any other provision of this Agreement, be paid an amount equal to (on a net basis) the Early Termination Payment …".

By *"Change of Control"* is meant:

"the Controlling Shareholder losing Control over the Bank or one party acquiring Control of the Controlling Shareholder at any given time up to and including the Expiration Date …".

34. It is the Claimants' case that they were only willing to agree to the *"Change of Control"* provisions no longer appearing in their respective employment contracts on the basis that, as Dr Aras put it in his witness statement, *"there were no circumstances in which NBG would sell the Bank at a price which was below its equity book value"*. It is this issue to which I shall have to return.

The lead-up to the SSPA

35. Coming back to the sale by NBG of its shareholding in Finansbank, during August and September 2015, NBG sent out so-called *"Phase 1"* process letters to various parties. Taking the example of the letter which was sent to QNB dated 13 August 2015, although the letters were in identical format, this stated, *inter alia*, as follows:

"The purpose of the Non-Binding Proposal is to determine which parties will be invited to the second phase of the process, where selected parties will be permitted to have access to a virtual dataroom, perform due diligence, meet Finansbank management, participate to Q&A session with NBG and Finansbank management, attend site visit in Turkey to Finansbank key premises and branches as well as receive a draft Share Purchase Agreement, specifying the intended terms of the proposed Transaction.

NBG's primary objective in considering the Non-Binding Proposals is to arrange for the sale of its entire shareholding in Finansbank for cash in a manner that maximizes value to NBG's shareholders and consummates the transaction as expeditiously as possible upon terms and conditions considered appropriate by NBG and pursuant to an agreement providing for certainty of closing and proceeds.

Please note that (i) NBG may explore strategic alternatives to achieve its objective of sending a meaningful stake in Finansbank including a potential re-IPO of the

Company and (ii) a limited number of potential private buyers are being invited to participate in the sale process."

The letters went on, when describing the basis on which the *"NON-BINDING PROPOSAL"* should be made, to include the following requirements:

"(b)A proposed non-binding indication of the cash purchase consideration in Euros that you would be prepared to pay for NBG's 99.8% stake in Finansbank and NBG's 29.9% direct stake in Finans Leasing. You should indicate the TRY/EUR rate used for the purpose of calculating the indicative cash consideration. Confirmation should be given that the indication is on the basis of payment in cash in full on closing. Any price indicated on the basis of a formula or containing a non-cash element will not be considered and will be disregarded;

(c) A summary of the material assumptions forming the basis of your determination of the cash purchase price together with an explanation of your methodology used to determine the value of the business;

(d) A confirmation that you are prepared to refinance the Company's subordinated debt instruments held by NBG at closing of the contemplated Transaction;

…".

36. The letters also referred to the fact that their recipients would be receiving an *"Information Pack"*. This, at least the version dated September 2015, ran to some 114 pages. As Mr Valentin highlighted in closing: it emphasised that Finansbank was a universal bank, with a proven track record of success since its foundation, and an independent and experienced management team supporting strong growth since NBG's acquisition in 2006; it identified the key financial performance ratios, up to and including the second quarter of 2015 (the last quarter available as at the date that the Information Memorandum was produced); it highlighted, amongst the five features which made Finansbank *"an agile bank offering a compelling investment proposition"*, its proven and experienced management team; and it gave details of that team, the most senior members of which were the three Claimants.

37. Subsequently, on 23 November 2015, QNB made a Binding Offer for the purchase of NBG's stakes in both Finansbank and Finans Leasing. The relevant letter stated by reference to a Phase II letter which was not in evidence at trial, *inter alia*, as follows:

"In relation to your Phase II Process Letter dated 6 October 2015 (the 'Phase II Letter') and following our due diligence review to date of the Company [Finansbank], Qatar National Bank SAQ ('QNB') is pleased to present herewith its Binding Offer for the potential purchase of 99.87% of the shares and voting rights of Finansbank and 29.87% of the shares and voting rights of Finans Leasing (the 'Proposed Transaction') …

(ii) Transaction Perimeter

QNB is bidding for 99.81% of the shares and voting rights of the Company [Finansbank] and 29.87% of the shares and voting rights of Finans Leasing. As mentioned in the Phase II Letter, we assume that the 29.87% of the shares and voting

rights of Finans Leasing currently held directly by NBG will be transferred to the Company [Finansbank] prior to completion of the Proposed Transaction.

(iii) Consideration

Based on the due diligence undertaken and thorough analysis by QNB and its advisors, we are pleased to present our Binding Offer for the Proposed Transaction as follows:

(a) QNB's offer for NBG's 99.81% shareholding in Finansbank is EUR 2,685.8m; and

(b) QNB's offer for NBG's 29.87% shareholding in Finans Leasing is EUR 52.2m.

QNB's Binding Offer assumes a EUR to TRY exchange rate of 3.0494.

The indication of the considerations set out above is given on the basis of payment in cash in accordance with the terms and conditions set out in the Sale and Purchase Agreement (the 'SPA') as revised by us and attached to this Binding Offer (the 'SPA Mark-Up').

(iv) Valuation Approach

QNB considered customary valuation methodologies (including dividend discount model, adjusted net asset value, trading multiples, regression analysis, Gordon Growth Model and transaction multiples) for this Binding Offer. QNB has also taken into account due diligence findings from its advisors following extensive review of the materials provided in the virtual and physical data rooms, together with the respective question and answer process and interactions with Finansbank's management team.

(v) Refinancing of Company's Subordinated Debt Instruments

We confirm that we are prepared to take an assignment of the Company's [Finansbank's] subordinated debt instruments held by NBG (and as detailed in the SPA Mark-Up) at closing of the Proposed Transaction."

The Binding Offer went on, over the page, to note that due diligence was substantially complete, and that the only remaining items QNB required to review included *"unredacted copies of the senior management and executive management employment contracts"*, before later on stating that QNB had taken account of Finansbank's *"strong and experienced management team"*.

38. It was following receipt of QNB's Binding Offer that, as previously explained, NBG became formally committed to sell Finansbank by the end of December 2015, pursuant to the 2015 Restructuring Plan submitted to the European Commission, and as underwritten by the Greek State.

The SSPA

39. The SSPA dated 21 December 2015, which was drafted by Freshfields, NBG's solicitors, identified at Recitals (E) and (F) that NBG intended both to sell the *"Seller Shares"* (which included the Finansbank shares) and to assign the Subordinated Debt to QNB, identifying the Purchase Price (Clause 2) as a single amount of €2.75 billion for the *"Shares"* and providing for the assignment of the Subordinated Debt (Clause 3) at par value plus accrued but unpaid interest up to Closing, in consideration of payment to NBG of the *"Subordinated Debt Amount"* (defined, as appears below, as being US$910 million, plus interest), pursuant to a Transfer Agreement, a draft of which was included at Schedule 12 to the SSPA. The SSPA also provided for a Net Asset Adjustment (Clause 5) to cater for the possibility that the Actual Net Asset Value of Finansbank was less than its Reported Net Asset Value (defined, again as will appear, by reference to the *"Locked Box Accounts"*, namely the *"quarterly consolidated reviewed accounts of [Finansbank] in respect of the nine month period ended on [30 September 2015] ..."*) and contained an undertaking by NBG that since 30 September 2015 there had been no *"Leakage"* (as defined) and there would be no *"Leakage"* in the period up until Completion. The SSPA, furthermore, provided for payments to be made in Euros, save in respect of the Subordinated Debt Amount, which was to be paid in US Dollars (Clause 20).

40. Specifically, Schedule 15 to the SSPA contains various definitions, as follows:

"***Closing*** *means completion of the sale and purchase of the Shares in accordance with the provisions of this Agreement;*

Closing Date *means the date on which Closing occurs;*

Company *means Finansbank A.S. ...*

Default Interest *means interest at EURIBOR plus 5 per cent;*

Last Accounts Date *means 31 December 2014;*

Locked Box Accounts *means the quarterly consolidated reviewed accounts of the Company in respect of the nine month period ended on the Locked Box Accounts Date in the Agreed Form which have been prepared in accordance with BRSA requirements;*

Locked Box Accounts Date *means 30 September 2015;*

NBG Entities *means NBG Finance Dollar and NBG International Holdings;*

Pre-Closing Period *means the period from and including the date of this Agreement up to Closing;*

Subordinated Debt *means the USD 910,000,000 principal subordinated debt owed by the Company to the Seller as set out in Schedule 10;*

Subordinated Debt Amount *means the outstanding principal amount in respect of the Subordinated Debt plus any interest that has accrued and has not been paid up to and including the Closing Date;*

Subsidiaries *means the companies details of which are set out in Part B to Part g (inclusive) of Schedule 7 and* **Subsidiary** *means any one of them;*

Target Companies *means the Company and the Subsidiaries and* ***Target Company*** *means any of them;*

Transaction Documents *means this Agreement, the Disclosure Letter, the Transfer Agreement and any other documents in Agreed Form;*

Transfer Agreement *means the transfer agreement in the form set out in Schedule 12 (Transfer Agreement) to be entered into between the Seller and the Purchaser at Closing pursuant to which the Subordinated Debt is assigned to the Purchaser;*

… .".

41. The Preamble includes the following:

"(A) The Seller is the sole legal and beneficial shareholder and owner of the Seller Shares and the Subordinated Debt.

…

(E) The Seller intends to sell the Seller Shares and the Purchaser intends to purchase the Seller Shares.

(F) The Seller intends to assign the Subordinated Debt and the Purchaser intends to purchase the benefit of the Subordinated Debt.

(G) The Seller intends to procure that the NBG Entities shall sell the NBG Entity Shares and the Purchaser intends to purchase the NBG Entity Shares."

42. Clause 1.1 states that:

"*The sale and purchase of the Shares shall be on the terms set out in this Agreement*"

Clause 1.2, then, states that NBG "*warrants and covenants to*" QNB that:

"(a) the Shares will be sold with full title guarantee;

(b) the Subordinated Debt will be assigned with full title guarantee;

(c) it has, and at Closing it will have, the right to sell and transfer to the Purchaser the full legal and beneficial interest in the Seller Shares;

(d) it has, and at Closing it will have, the right to assign to the Purchaser the full legal and beneficial interest in the Subordinated Debt;

(e) the NBG Entities have, and at Closing will have, the right to sell and transfer to the Purchaser the full legal and beneficial interest in the NBG Entity Shares; and

(f) the Shares and Subordinated Debt shall, on Closing, be free from all Third Party Rights."

43. Clause 2 of the SSPA provides, *inter alia*, that:

"*2.1 The price for the Shares shall be the amount of EUR 2,750,000,000 (the Purchase Price)…*

2.2 Any payment made in satisfaction of a liability arising under a Seller Obligation or a Purchaser Obligation shall adjust the Purchase Price to the extent of such payment.

44. Clause 3 provides:

"*3.1 The Seller shall assign the Subordinated Debt to the Purchaser at par value plus accrued but unpaid interest up to the Closing Date free from Third Party Rights with effect from Closing with all rights attaching to it. The assignment of the Subordinated Debt shall be on the terms set out in this Agreement and in the Transfer Agreement set out in Schedule 12 (Transfer Agreement).*

3.2 The assignment of the Subordinated Debt shall be in consideration of the Purchaser's payment to the Seller of the Subordinated Debt Amount."

45. As for Schedule 12, as referred to in Clause 3, the draft "*Transfer Agreement*" includes the following wording by way of recitals:

"(A) On _______________ 2015 the Transferor and the Transferee entered into an agreement pursuant to which the Transferor ... agreed to sell their legal and beneficial interest in all of the shares they hold in the share capital (the Shares) of Finansbank A.S. (the Company) to the Transferee (the SPA).

(B) The Transferor and the Company have entered into four subordinated loan agreements, the details of which are set forth in Annex 3 to this Agreement (the Subordinated Loan Agreements)

(C) Pursuant to the terms of the SPA, the Transferor agreed to transfer the Subordinated Loan Agreements together with all its rights and obligations under the Subordinated Loan Agreements to the Transferee…

(D) This Agreement is entered into pursuant to clause 3 of the SPA."

Clause 1, then, provides, *inter alia*, that:

"*For the purposes of this Agreement, the date on which the completion of the sale and purchase of the Shares in accordance with the provisions of the SPA occurs shall be referred to as the Closing Date.*"

Clause 5 goes on:

"*Pursuant to clause 3 of the SPA and subject to clause 6 of this Agreement, the Transferee shall pay, on the Closing Date, an amount equal to the outstanding principal amount in respect of the Subordinated Debt plus any interest that has accrued but has not been paid up to and including the Closing Date (the Consideration).*"

Annex 3, then, lists the four subordinated loan agreements which make up the Subordinated Debt which is the subject of the present claim. So, too, does Schedule 10 to the SSPA.

46. Clause 6 of the SSPA (*"No Leakage Undertaking"*) provides:

"6.1 The Seller undertakes to the Purchaser that since the Locked Box Accounts Date:

(a) there has not been any Leakage and there will not be any Leakage in the Pre-Closing Period;

(b) no arrangement or agreement has been made or will in the Pre-Closing Period be made that will, or might reasonably be expected to, result in any Leakage; and

(c) other than Permitted Leakage, no Target Company has paid nor has become obliged to pay (or will in the Pre-Closing Period pay or become obliged to pay) any third party costs relating to the Proposed Transaction."

Schedule 15 to the SSPA defined *"Leakage"* broadly as payments out, transfers of assets or shareholdings of, or waiver of obligations owed to Target Companies. Schedule 1 to the SSPA defined Permitted Leakage in narrow terms associated with the incidental and consequential costs of executing the SSPA itself.

47. By paragraph 1.8 of Part B of Schedule 4 to the SSPA, NBG warranted to QNB that:

"The Locked Box Accounts give a true and fair view of the financial position of the Company as at the Locked Box Accounts Date and of the income statements of the Company as at the Locked Box Accounts Date in accordance with the Turkish Commercial Code and in accordance with accounting and financial reporting regulations, circulars, communiques and pronouncements published by BRSA, and in accordance with Turkish Accounting Standards and Turkish Financial Reporting Standards in relation to matters not regulated by BRSA accounting and reporting requirements."

48. Clause 17 provides:

"*The Parties acknowledge that the Inter-Company Debt will not be repaid at Closing but shall remain repayable in accordance with the relevant terms and conditions governing the same.*"

49. Clause 20 of the SSPA provides for the manner in which payments due under it were to be made, including:

"*20.1 Subject to Clause 20.2 below, any payment to be made pursuant to this Agreement by the Purchaser ... shall be made to [various identified bank accounts].*

20.2 Any payment in respect of the Subordinated Debt Amount by the Purchaser ... shall be made to the Seller's USD Bank Account.

...

20.4 Payments under Clauses 20.1, 20.2 … above shall be in immediately available funds by electronic transfer on the due date for payment. Receipt of the amount due shall be an effective discharge of the relevant payment obligation.

20.5 If any sum due for payment in accordance with this Agreement is not paid on the due date for payment, the person in default shall pay Default Interest on the sum from, but excluding, the date to, and including, the date of actual payment calculated on a daily basis.

20.6 Any payment of the Purchase Price shall be payable in EUR and any payment of the Subordinated Debt Amount shall be payable in USD."

50. As far as the SSPA's treatment of the Finans Leasing shares was concerned, as previously noted, the Purchase Price was stated to be in respect of the *"Shares"*. No specific provision was made in respect of NBG's Finans Leasing shares. There was, in particular, no direct obligation on NBG to transfer those shares to Finansbank before Completion. However, as Mr Valentin pointed out and as Mr Parker, in effect, acknowledged, the SSPA did contain certain provisions which showed that it was expected that this would occur. Thus, Clause 7 of the SSPA provides, *inter alia*, that:

"*7.1 To the extent permissible under applicable competition/anti-trust laws and subject to Clause 7.2, from the date of this Agreement until Closing, the Seller shall:*

(a) ensure that the business of each Target Company is carried on only in the ordinary course of business in all material respects consistent with past practice over the preceding 18 months and as a going concern;

(b) take all reasonable steps, and procure that each of the Target Companies takes all reasonable steps, to preserve and protect the assets of the Target Companies (including relationships with customers); and

(c) comply with the obligations set out in Schedule 2 (Conduct of the Target Companies Pre-Closing)."

Clause 7.2 excepts from this obligation any variations in the business of the Target Companies agreed in writing or required by applicable laws, and Schedule 2 may be summarised as prohibiting substantial changes in the asset position, business or employment practices of any of the Target Companies. In particular, Schedule 2 to the SSPA requires in Clause 1 that:

"(a) no Target Company creates, issues, allots, acquires (other than, in the case of [Finansbank], the acquisition of the Finans Leasing Shares, …) … repays or redeems any share capital, or agrees, arranges or undertakes to do any of those things (except … the acquisition, repayment or redemption by a Target Company in respect of the share capital of another Target Company),… ."

Furthermore, not only does Schedule 7 to the SSPA list the company information on the Target Companies (and this information included Finans Leasing), but, in addition, Schedule 3, Part A, which deals with NBG's obligations as regards *"Closing Arrangements"*, obliges NBG, *inter alia*, to *"deliver to the Purchaser [QNB] evidence (in form and substance acceptable to the Purchaser [QNB], acting*

reasonably) that the Finans Leasing Shares have been transferred to the Company [Finansbank] by the Seller [NBG] and that no ongoing liabilities have been assumed by the Company [Finansbank] in connection with such transfer" (see Clause 1(j)).

51. Having entered into the SSPA, the next day, 22 December 2015, NBG issued a Press Release, which stated:

"[NBG] enters into a definitive agreement with [QNB] to sell its 99.81% stake in [Finansbank] for a total consideration of €2,750 million (the "Transaction").

On 21 December 2015, [NBG] Board of Directors approved the divestiture to [QNB] of NBG's 99.81% stake in [Finansbank], together with other minor direct and indirect interests [footnote reference to, among other interests, NBG's 29.87% stake in Finans Leasing]. The agreed consideration for the transaction amounts to €2,750 million. In addition, QNB will repay upon closing the $910 million of subordinated debt that NBG has extended to Finansbank, increasing the liquidity of the NBG group by approximately €3.5 billion. ...

The sale of Finansbank reaffirms NBG's management commitment to the successful implementation of the Bank's restructuring plan and its long-term strategy to successfully redeploy capital towards the Greek economy and play a leading role in the country's economic recovery."

52. NBG also, the same day, produced an investor presentation entitled *"Finansbank sale: significant capital and liquidity enhancement"* which similarly referred to NBG having entered into a *"definitive agreement"* with QNB, before going on to record in the third bullet point under *"Key messages"* that the purchase price of €2.75 billion, payable in cash, *"implies a transaction P/TBV Q3'15 around 1.0x, at a premium to average current market valuations of Turkish peers"*. Later on, under *"Transaction highlights"*, this document described the *"Transaction details"* as being:

"- Purchase price of €2.75 billion, payable in cash

- Involves the sale of 99.8% of Finansbank and 29.9% of Finans Leasing

- QNB to refinance fully the USD 910m Tier 2 facility at closing."

The presentation then described the positive impact of the transaction for NBG's capital ratios in terms which involved using an TL/€ exchange rate as at 30 September 2015 and highlighted that the effect of the transaction was to render NBG the best capitalised bank in Greece, with the highest liquidity and best asset quality in the Greek market.

The QNB Side Letter

53. The same day as the SSPA was entered into, 21 December 2015, QNB and NBG entered into a side letter (the 'QNB Side Letter') relating to *"Management retention and incentive arrangements"*. This referred to the SSPA (Clause 1.1) as well as the IFAs (Clause 1.2), together with the Claimants' employment contracts as extended (Clause 1.3), and then goes on (under the heading *"PAYMENT UNDERTAKING AND INDEMNITY"*) to provide as follows:

"2.1 QNB undertakes to pay (or procure the payment (including, at the absolute discretion of QNB, by [Finansbank]) of) the Fee to the [Claimants] in accordance with, and on the terms of, the [IFAs], subject to Closing under the SPA having occurred".

2.2 In the event that QNB fails to discharge in full its obligation referred to in paragraph 2.1 above, it shall indemnify and hold harmless NBG against any losses which NBG may suffer as a result, including as a result of any claim brought against NBG by any [of the Claimants] for non-payment of the Fee. …".

54. Clause 2.3, then, deals with the situation in which the Claimants made a claim against NBG for non-payment of the Fee; Clause 2.4 entails a warranty from NBG that it had provided true and accurate copies of the IFAs; and Clause 2.5 constitutes QNB's acknowledgement that it had received copies of the IFAs, which were deemed disclosed *"notwithstanding the fact that they had not been referred to in the Disclosure Letter or uploaded to the Data Room"*. Clause 3 (*"EFFECT AND TERMINATION"*) is, then, in these terms:

"The agreement recorded in this side letter shall come into full force and effect upon Completion under the SPA occurring. It shall automatically terminate: (i) in the event of the SPA terminating before Completion; or (ii) upon payment of the Fee to the [Claimants] in full."

55. The significance or otherwise of the QNB Side Letter, together with a related conflict of recollection on the part of Mr Mylonas and Dr Aras (as well as Mr Guzeloglu) concerning a meeting which took place on 17 December 2015, are matters which I shall come to consider later when dealing with the Claimants' (alternative) estoppel by convention case.

Completion

56. Coming on, lastly and briefly, to deal with completion, this had several aspects.

57. On 1 February 2016, NBG approved the sale and transfer of its shares in Finans Leasing to Finansbank. On 16 February 2016, NBG notified QNB of the transfer, purportedly as a transaction which involved *"Leakage"* of €38,886,563.04. Specifically, NBG wrote to QNB saying this:

"1. We refer to the agreement (the SPA) dated 21 December 2015 for the sale and purchase of Finansbank A.S between the Seller and the Purchaser Terms defined in the SPA have the same meaning when used in this notice.

2. We hereby give you notice that the transfer of the Finans Leasing Shares from the Seller to the Company completed on 10 February 2016. We are sending you details of the transfer along with this notice and confirm that the Company has not assumed any ongoing liabilities in connection with such transfer.

3. The amount of the consideration paid by the Company to the Seller for the Finans Leasing Shares, which constitutes Leakage under the SPA, is EUR 38,886,563.04 (being TRY 128,111,781.94 converted into euros at the Exchange Rate on 10

February 2016, the date such payment was made) and we hereby give you notice of such Leakage in accordance with clause 6.2 of the SPA."

58. As Mr Valentin put it and as Mr Mylonas essentially acknowledged during the course of his cross-examination, although the consequences as regards the interpretation to be afforded to the IFAs is a matter which I shall come on to address, the economic reality of this arrangement was that, pursuant to the SSPA: (i) as was assumed in QNB's Binding Offer letter of 23 November 2015, Finansbank had acquired NBG's Finans Leasing shares; (ii) NBG had received payment in full in respect of the Finans Leasing shares; (iii) when QNB acquired the Finansbank shares at Completion, it thereby also acquired the Finans Leasing shares; and (iv) the reason that QNB paid only €2.711 billion at Completion was that NBG had already received the residual amount from Finansbank (which was for all practical purposes acting on behalf of QNB) in February 2016.

59. On 31 March 2016, the published *"Equity Book Value"* of Finansbank at Q2, 2016 was: (excluding NBG's Finans Leasing shares) TL9,232,092,000 (or €2,877,744,459 at the 3.2081 TL-€ exchange rate applicable on that date); (including NBG's Finans Leasing shares) TL9,418,149,000 (or €2,935,740,469).

60. On 15 June 2016, completion of the SSPA took place, and the transfer of the Subordinated Debt took effect. QNB paid NBG €2,711,113,000 to acquire the Finansbank shares and US$910 million in respect of its subordinated debt.

Principles applicable to contractual construction

61. The principles concerning contractual interpretation occupy ground which has been very well trodden in recent years. The then Chancellor, Sir Terence Etherton (now the Master of the Rolls), indeed, in ***Credit Suisse Asset Management LLC v Titan Europe 2006-1 PLC & Others*** [2016] EWHC 969 (Ch) at [23]) described how the parties in that case relied upon *"the usual cohort of authorities"*, listing ***Investors Compensation Scheme v West Bromwich Building Society*** [1998] 1 WLR 896, ***Chartbrook Limited v Persimmon Homes Limited*** [2009] 1 AC 1101, ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50, ***Re Sigma Finance Corporation*** [2009] UKSC 2 and ***Arnold v Britton*** [2015] UKSC 36. [2015] AC 1619. To that list may now be added ***Wood v Capita Insurances Services Ltd*** [2017] AC 1173 which was relied upon by both Mr Valentin and Mr Parker before me.

62. The key consideration, as Lord Hoffmann explained in ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] UKHL 38, [2009] AC 1101 at [14], is *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"*. This will be identified *"by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context"*, as Lord Neuberger put it in ***Arnold v Britton*** [2015] UKSC 36, [2015] AC 1619 at [15] before going on to explain that:

"That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the

parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

63. Lord Neuberger's point (vi) is consistent with the fact that the actual understanding of either party as to what the contract meant is irrelevant and evidence of the parties' subjective intentions is similarly inadmissible, as explained by Leggatt J (as he then was) in ***Tartsinis v Navona Management Company*** [2015] EWHC 57 (Comm) at [9]:

"… in deciding what a contract means, English law does not attempt to identify what the parties actually understood or intended the language used in the contract to mean. Instead, the law adopts an 'objective' approach to interpretation. As Lord Hoffmann might have said, I do not think that the extent to which this is so is always sufficiently appreciated. It is not simply that a court, in interpreting a contract, has no window into the minds of the parties and must therefore necessarily draw inferences about what the parties were using the language of the contract to mean, adopting the standpoint of a reasonable observer. What the parties to the contract actually meant, or whether they had any pertinent subjective intention at all, is irrelevant to the task of interpretation. Rather, the court identifies the meaning of the language used by assuming that the parties were reasonable people using the language of the contract to express a common intention. …".

64. Nor is evidence of the parties' pre-contractual negotiations admissible since what is known as *"the exclusionary rule"*, Lord Hoffmann explained in ***Chartbrook*** at [42], *"excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant"*. So, too, is evidence of subsequent conduct inadmissible. As Leggatt J put it in ***Tartsinis*** at [10]:

"A second important feature of the applicable rules of English law is that evidence of what was said during the negotiation of the contract is not admissible for the purpose of interpretation. One reason for this is that such evidence is generally of no help in ascertaining the objective meaning of the document. Even where such evidence could potentially bear on that meaning, however, it is not admissible: see Chartbrook v Persimmon Homes [2009] 1 AC 1101, 1120-1, para 41. Evidence of the subsequent conduct of the parties is also inadmissible to interpret a contract: see e.g. James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583."

65. As to ***Wood***, the most recent Supreme Court authority dealing with the principles applicable to contractual construction, in that case, Lord Hodge noted as follows at [10]:

"It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

Lord Hodge went on at [11] to make the point by reference to Lord Clarke's judgment in ***Rainy Sky*** that interpretation is a unitary exercise:

"Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke states in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

He then went on at [12] to describe the process of construction as an iterative process, explaining what he meant by this in the following way:

"This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

Lord Hodge then observed as follows at [13]:

"Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The

iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

66. It is with these principles in mind that I come on next to consider the parties' rival contentions which I summarise below, after first saying something about the formula contained in the Appendix to the IFAs.

The formula contained in the Appendix to the IFAs

67. It will be recalled that Clause 4.1 of the IFAs provides that *"The Fee payable in respect of an Exit Event will be determined in accordance with the provisions set out in the Appendix to this Agreement"*.

68. As for the Appendix to the IFAs, as will again be recalled, this provides that the Fee is to be calculated by reference to 'price to book' ratios, specifically through a comparison of values *"A"* and *"B"*, with *"A"* being the value of Finansbank *"by reference to the Exit Value"* (*"C"*) divided by *"the last Equity Book Value published in accordance with the BRSA standards before the Exit Event"* (*"D"*), and *"B"* being calculated by a formula that is applied to the market capitalisations and last equity book values of two other banks listed on the Istanbul Stock Exchange.

69. It is in relation to *"A"* that the dispute exists since there is no issue as to *"B"*: if the value of *"A"* is greater than or equal to one (1), then, a Fee is payable; conversely, if the value of *"A"* is less than one (1), then, no Fee is payable. Put another way, a Fee is payable only if the *"Exit Value"* exceeds or equals the relevant applicable *"Equity Book Value"*.

70. It is in this context that the four areas of dispute which I have previously identified arise, namely (in the order favoured by Mr Parker which differs from the order described by me earlier and the order in which I propose to deal with things below): (i) whether *"the value of the Company by reference to the Exit Value"* includes the sum of US$910 million received by NBG as part of the transaction in respect of the Subordinated Debt; (ii) whether *"the value of the Company by reference to the Exit Value"* includes the sum of €38,887,000 that was received by NBG as part of the consideration for the transaction in respect of its stake in Finans Leasing; (iii) what is the correct approach to the applicable currency exchange rate when comparing the *"Exit Value"* and the *"Equity Book Value"*; and (iv) when is the *"last Equity Book Value published in accordance with the BRSA standards before the Exit Event"*.

The Claimants' primary case (in summary)

71. The Claimants' primary case (and so putting to one side, for the present, their alternative estoppel case) is that, as a matter of construction, the appropriate analysis is as follows:

(1) The relevant *"Exit Event"* was the execution of the SSPA on 21 December 2015. That was a *"Total Exit Event"* because it involved the disposal by NBG to QNB of 50% or more of the *"The NBG Holding"*. The IFAs draw a clear distinction between the *"Exit Event"* and *"Completion"* of an *"Exit Event"*: thus, the SSPA itself was the *"Exit Event"* and the closing of the SSPA (in June

2016) was *"Completion"* of that *"Exit Event"*. Execution of the SSPA constituted the relevant *"disposal"* for these purposes.

(2) It follows that the *"last Equity Book Value published in accordance with the BRSA standards"* before the SSPA was that as at 30 September 2015. That date was also the *"Locked Box Accounts Date"*, under the SSPA, and was, therefore, the relevant book value by reference to which both NBG and QNB had negotiated, agreed and executed the transaction. Any value increase after that date was exclusively to QNB's account.

(3) In order to compare (as the Appendix to the IFAs requires) *"the value of the Company by reference to the Exit Value"* (which was denominated in Euros) with the Equity Book Value as at 30 September 2015 (which was denominated in Turkish Lira), the approach which gives best effect to the purpose of the IFAs by creating a predictable incentive for the Claimants is to convert the (Turkish Lira denominated) Equity Book Value into Euros, and the only rational date on which to convert the relevant (Turkish Lira denominated) *"Equity Book Value"* into Euros is the same date as the *"Equity Book Value"* (30 September 2015). To perform the conversion on any other date would involve using a different exchange rate to the one that was applicable on the accounting date (30 September 2015) and would, therefore, give rise to a fictional amount affected by whatever fluctuations had occurred in the TL-€ exchange rate since the relevant accounting date. Put simply, it would then no longer represent the *"Equity Book Value"* as at 30 September 2015, which the IFAs assumed would remain a constant for comparison purposes.

(4) The *"Equity Book Value"* as at 30 September 2015 was TL9,099,950,000. Converted into Euros by reference to the 3.4212 TL-€ exchange rate applicable on that date, the relevant Equity Book Value that constitutes the Denominator (D) in the formula in paragraph 2 of the Appendix to the IFAs was, therefore, €2.659 billion.

72. Furthermore, Mr Valentin submitted, identification of *"C"* (the *"value of the Company by reference to the Exit Value")* involves identifying *"the value of the Company by reference to the aggregate value of the consideration paid in respect of the disposal by NBG to [QNB] of ... The NBG Holding"* (combining the IFA's definitions of *"C"*, *"Exit Value"* and *"Exit Event"*), and this covers not only the amount paid for NBG's shareholding in Finansbank (€2.711 billion) but also the amount which NBG received from Finansbank in respect of the Finans Leasing shares (€38,886,563). The position, Mr Valentin explained, taking no account of the Subordinated Debt, is as set out in the table below:

			"C"	**"D"**			**"A"**
Exit Event	**FX Date**	**Finans Leasing**	**Exit Value in €**	**EBV in € (30 Sept 15)**	**EBV in TL (30 Sept 15)**	**Euro/TL Exchange rate**	**"A"**
21-Dec-15	30 Sep 15	In	2,750,000	2,659,871	9,099,950	3.4212	1.033885

		Out	2,711,113	2,659,871	9,099,950	3.4212	1.019265

Accordingly, Mr Valentin submitted, *"A"* is greater than 1 (one) because (without including the Subordinated Debt) €2.75 billion (*"C"*) divided by €2.659 billion (*"D"*) equals 1.0339.

73. Although it is not necessary to go further than this in order for the Court to conclude that the Claimants are entitled to receive a Fee, Mr Valentin went on to submit that the aggregate value of the consideration paid in respect of the disposal to QNB of The NBG Holding also included the amount of the Subordinated Debt, US$910 million, paid by QNB to NBG. This, he submitted, ought to be the case because: (i) from the outset of the sale process the Subordinated Debt was treated by NBG as an essential element which was part and parcel of the same transaction, and (ii) the Subordinated Debt was only identified separately in the SSPA, and paid as a separate amount into a separate bank account, owing to the fact that it was denominated in US Dollars rather than Euros. If the Subordinated Debt is included, then, Mr Valentin pointed out, *"C"* is €3.55 billion and dividing this by *"D"* (€2.659 billion) gives 1.3382 if the Finans Leasing shares are included and 1.3235 if they are left out of account.

NBG's case (in summary)

74. Turning to NBG's position, the focus of the IFAs, Mr Parker submitted, was on the *actual* disposal by NBG of its shares and the actual receipt by NBG of payment for those shares. This, he submitted, is illustrated by the facts that: the IFAs provide for the possible payment of a Fee linked to the *"disposal"* by NBG of its shares in Finansbank (Clause 1); the event which would potentially give rise to the payment of a Fee was an *"Exit Event"*, which was defined as the *"disposal"* by NBG of its shares in Finansbank, and not merely an agreement by NBG to dispose of its shares (Clause 3); the value to be attributed to such a disposal, the *"Exit Value"*, was the *"consideration paid"* in respect of an *"Exit Event"*, not the consideration agreed to be paid (Clause 2); and any Fee would not fall due until after *"Completion"* of an *"Exit Event"*, which meant the *"receipt"* by NBG of the consideration payable with respect to an *"Exit Event"* (Clause 2).

75. Secondly, Mr Parker submitted, the assessment of whether the *"Exit Value"* was at a premium to book value is to be carried out as at the date when the consideration is paid (which is what constituted the *"Exit Value"*), or alternatively as at the date of the *"Exit Event"* (which is what trigged the potential Fee). In either case, the *"Exit Value"* has to be converted into Turkish Liras as at that date in order to compare it with the *"Equity Book Value"* of Finansbank. It would be meaningless to determine what the value of the *"Exit Value"* in Turkish Liras would have been on some earlier date: it has to be determined as at the date upon which it is paid (or on which the disposal of the shares takes place). The date upon which the *"Equity Book Value"* was last published is only identified as being the date on which that figure is most recently available. The comparison with the company's *"Equity Book Value"* is made on the assumption that it remains the same as at the date on which the price is paid (or the *"Exit Event"* takes place).

76. Thirdly, Mr Parker submitted, since the IFAs were specifically concerned only with the disposal of NBG's shares in Finansbank, the *"Exit Event"* being expressly confined to a disposal of those shares, the sale of the Subordinated Debt would not comprise an *"Exit Event"* and would not trigger a potential Fee under the IFAs. The *"Exit Value"* comprised the €2.711 billion paid to NBG for its shares in Finansbank. The money paid to NBG for the Subordinated Debt did not form part of the *"Exit Value"*. It was not part of the price paid for the shares but for an entirely separate asset, namely the debt owed by Finansbank to NBG. Had the parties intended that any payment for the Subordinated Debt should be included in the *"Exit Value"*, the IFAs would have said so. Moreover, the requirement that the shares in Finansbank be sold at a premium to book value requires a comparison between the value of the company's net assets and the price paid for those assets. The Subordinated Debt was not an asset of Finansbank. To include the price paid for that asset as part of the *"Exit Value"* would, Mr Parker submitted, be to render that comparison meaningless.

77. Similarly, and fourthly, although NBG also held, separately, a 29.87% shareholding in Finans Leasing, the IFAs made no mention of that shareholding. It was not included within the definition of the *"NBG Holding"*, the disposal of which would comprise an *"Exit Event"* and trigger the potential payment of a Fee.

Preliminary

78. It is against this background that I come on to address the issues. Although I agree with Mr Parker that, logically, the first issue to consider is what is included in the *"Exit Value"*, and so whether the *"value of the Company"* (*"C"*) includes what was paid for the Subordinated Debt and the shares in Finans Leasing, I propose nonetheless to deal with matters in the order suggested by Mr Valentin, namely starting with issues (iv) and (iii) (in that order) and only then coming on to address issues (i) and (ii). This is because it was common ground between Mr Valentin and Mr Parker that, if the Claimants are right in relation to issues (iii) and (iv), then, a Fee is payable because the value of *"A"* is greater than one (1) regardless of whether they are also right in relation to issues (i) and (ii). Put differently, if the Claimants are right in relation to issues (iii) and (iv), the significance of issues (i) and (ii) is limited to the amount of the Fee which is payable.

Issue (iv): when is the *"last Equity Book Value published in accordance with the BRSA standards before the Exit Event"*?

79. At the core of the question which arises here is whether, on the proper construction of the IFAs, the *"Exit Event"* was (as the Claimants maintain) execution of the SSPA on 21 December 2015 (so as to mean that the last *"Equity Book Value"* for the purposes of the formula contained in the Appendix to the IFAs was that published on 30 September 2015) or (as NBG contends) the Completion of the SSPA on 15 June 2016 (so as to mean that the last *"Equity Book Value"* was that published on 31 March 2016).

80. The significance of this dispute lies not only in the ascertainment of the last *"Equity Book Value"*, this being significantly higher on 30 March 2016 than it was on 30

September 2015, but also, as Mr Parker explained, in the determination of the date when the value of *"C"* is to be converted into Turkish Lira (and so issue (iii)).

81. It was Mr Parker's submission, as previously mentioned, that the plain meaning of the words in the IFAs is that the *"Exit Event"* was the date upon which NBG actually transferred its shares in Finansbank to a third party. He submitted, in particular, as just observed, that an *"Exit Event"* must entail the *"disposal"* by NBG of its shares in Finansbank, and not merely an agreement to sell those shares, in circumstances where the completion of the sale under the SSPA was subject to a number of contingencies. He cited, in this context, the fact that the sale was conditional, for example, upon the sale being approved by the Turkish Competition Board, the Turkish Banking Regulatory Supervising Agency (BRSA) and the Qatar Central Bank. If any of those entities had objected to the sale, Mr Parker explained, it would not have been able to have gone ahead. Accordingly, Mr Parker reasoned, the SSPA itself cannot fairly be considered a *"disposal"* of NBG's shares since NBG might never dispose of its shares at all.

82. Mr Parker went on to submit that the reason why the IFAs distinguished between an *"Exit Event"* and *"Completion"* is not because the former is to be taken as being when a sale is agreed but because the *"Exit Event"* is the *"disposal by NBG"* of its shares whereas *"Completion"* is *"the receipt by NBG of the consideration payable"*. This, Mr Parker submitted, is consistent with the fact that Clause 3 refers to *"The Executive"* being *"entitled to a Fee"* only *"following the Completion of an Exit Event"*, and so with the relevant distinction, for present purposes, being not between the time when a sale is agreed and completion of that sale but between the time when shares are transferred pursuant to the agreement to sell and payment of the agreed consideration.

83. I do not agree with these submissions for a number of reasons. It is clear, as Mr Parker's submissions themselves recognised, that there is a distinction to be found in the IFAs between an *"Exit Event"* and *"Completion"* of an *"Exit Event"*. Thus, Clause 4.1 provides, in terms, that the *"Fee payable in respect of an Exit Event"* will be determined in accordance with the provisions set out in the Appendix. The focus here, therefore, is on the *"Exit Event"* rather than *"Completion"*. The fact that Clause 3 refers to the Fee being payable *"following the Completion of an Exit Event"* does not shift that focus but merely fixes the point in time when the Fee is payable. Perfectly sensibly, the agreement is that NBG should not have to pay anything until it has itself been put in funds by its purchaser. It is, however, the fact that there has been an *"Exit Event"* which is material, as made clear by the fact that the first paragraph of Clause 3 states that *"For the avoidance of doubt, no fee will be payable if there is no Exit Event"*. If there is no *"Completion"*, this means that NBG will not have been paid and so the obligation to pay the Fee will not come into play, but this does not mean that it is *"Completion"* which is itself the *"Exit Event"*.

84. As I have observed, Mr Parker did not, in fact, however, seek to argue that there was not this distinction. The issue, in the circumstances, is whether Mr Parker was right when he submitted that there is a distinction between disposal of the shares (what Mr Parker would say constituted the *"Exit Event"*) and receipt of the consideration payable in respect of that disposal (*"Completion"* as defined in the IFAs). This boils down to whether the words *"the disposal by NBG"* contained in the definition of

"Partial Exit Event" or, more relevantly in this case, *"Total Exit Event"*, means actual disposal of NBG's shares in Finansbank or an agreement (in the form, in the event, of the SSPA) to sell those shares to a third party. Although there is a certain attraction to Mr Parker's straightforward reliance on the word *"disposal"* meaning actual transfer of NBG's shares, as opposed to an agreement to transfer such shares, I am not persuaded by his argument. It seems to me, on the contrary, that *"disposal"* in the context of the IFAs, must mean the latter rather than the former. I struggle, in essence, to see how it can be right that, NBG having entered into the SSPA and so having becoming contractually bound to sell to QNB, nonetheless there was no *"disposal"* for the purposes of the IFAs. As Mr Valentin submitted, had NBG failed to perform its obligations under the SSPA, QNB would, in all likelihood, have been able to obtain an order for specific performance requiring NBG to proceed with the sale. NBG was committed to sell to QNB having concluded the SSPA. Completion, both as defined in the IFAs (as meaning *"the receipt by NBG of the consideration payable with respect to that Exit Event"*) and as more generally understood (as meaning transfer of shares and payment for that transfer), was going to happen in accordance with the obligations (both on the part of NBG and on the part of QNB) contained in the SSPA. In practical terms, therefore, it was the SSPA which amounted to the relevant *"disposal"* for the purposes of the IFAs.

85. It follows that I do not accept the validity of the distinction which Mr Parker sought to draw between share transfer and receipt by NBG of the consideration paid (by QNB, in the event) in respect of the shares. This is a distinction which, in my view, is rather too subtle and which I somewhat doubt would have been at the forefront of the parties' minds when they entered into the IFAs. These were agreements which, whilst drafted by lawyers and whilst relatively sophisticated, were clearly not the most sophisticated of their kind. I am clear, in the circumstances, that, in using the language of *"disposal"*, it would not have been intended that there should be the distinction which Mr Parker suggested. As I have already observed, completion is generally something which entails the carrying out of what has previously been agreed should happen: in the case of a sale, transfer of the item being sold, and payment of the price agreed in respect of that item. It is most unlikely, in the circumstances, that the parties to the IFAs would have had in mind that completion should be approached on the basis now suggested by Mr Parker. The fact that the definition of *"Completion"* in the IFAs refers only to receipt of the consideration paid by the purchaser does not change matters. The more so, since it would have been a straightforward matter for the parties to have spelt out the distinction if it had been one which they intended should operate. Instead, as Mr Valentin submitted, they used what he described as the more adaptable language of *"disposal"* in order to cater for a number of possibilities which were, by definition unforeseen in December 2011, when the IFAs were entered into.

86. There is a further reason why I cannot accept Mr Parker's submissions on this issue. This is that, since the purpose of the IFAs (as described in Clause 1) was to incentivise the Claimants to use their best efforts to dispose of NBG's interest in the Finansbank Group, then, it is difficult to see why the focus should be on anything coming after the time when the SSPA was entered into. It was at that point, as already mentioned, that NBG entered into a binding agreement to sell Finansbank. It was at that point that the price was agreed with QNB (subject only to *"Leakage"*) and, as such, as Mr Valentin put it, the Claimants' mission, as it were, had been accomplished: they had either succeeded (because the *"Exit Value"* achieved by NBG

was, in fact, equal to, or greater than, the *"last Equity Book Value"*), or they had failed (because the *"Exit Value"* achieved by NBG was, in fact, less than the *"last Equity Book Value"*), but, either way, they had done what they had been incentivised by the IFAs to do. This consideration, in my view, provides considerable support for the Claimants' case that the relevant *"Exit Event"* is NBG's entry into an agreement to sell (in the event, the SSPA) and that, as such, the relevant last *"Equity Book Value"* is the September 2015 book value which was available to the parties when negotiating the agreed value specified in the SSPA. After the SSPA was concluded, the Claimants were in no position to influence the achievement of a higher *"Exit Value"*. More than that, as Mr Valentin pointed out, after the *"Locked Box Accounts Date"* (30 September 2015), any additional value or losses accruing to Finansbank would naturally fall to the account or for the benefit of QNB. It follows that, after execution of the SSPA, the positions of the Claimants and NBG ceased to be aligned.

87. This last point was something which Mr Mylonas accepted in cross-examination albeit that he rightly made the point that there was nonetheless a continuing alignment in other respects. For example, in his closing submissions, Mr Parker observed that since, in the event of *"Leakage"* between the date of the SSPA and the closing date, the price payable by QNB for NBG's shares would be reduced, so the Claimants were in a position to try to minimise this and maximise the *"Exit Value"*. It is, however, the fact that there was no longer total alignment after the SSPA had been entered into and, in any event, that matters for present purposes. In short, whatever incentive existed after the SSPA had been entered into was necessarily more limited than it had been before that event occurred and there was no longer the complete identity of interests between the Claimants and NBG which had previously existed. In fact, however, the point goes further than this since I agree with Mr Valentin when he went on to submit that, if the correct interpretation of the IFAs is that the *"Exit Event"* is when NBG's shares in Finansbank were actually transferred to QNB, notwithstanding that the *"Exit Value"* is the amount of consideration which in the SSPA it was agreed would be paid, then, this would create what Mr Valentin characterised as *"a perverse incentive"* on the part of the Claimants to ensure that they received a Fee under the IFAs or to ensure that the Fee was higher than it might otherwise have been by seeking to cause a reduction in Finansbank's *"last Equity Book Value"* before transfer of NBG's shares, the relevant *"Exit Event"* on this hypothesis. It seems to me that it is most unlikely that, in drafting the IFAs, the intention can have been that this situation could potentially arise. It is nothing to the point that, as Mr Parker pointed out in his closing submissions, Dr Aras accepted in his evidence that the Claimants *"would never even contemplate taking such actions"*, nor that this would involve the Claimants acting in breach of their obligations as employees of Finansbank. What matters is that it is unlikely that, in entering into the IFAs, the parties would have contemplated that the Claimants would find themselves in the situation which I have described, however implausible it might be that, in practice, the Claimants would act in such a way. I would add that it is also nothing to the point that, as Mr Parker submitted, the IFAs did not expressly require the Claimants to do anything as such to maximise the amount received by NBG for its shares since the intention which lay behind the IFAs was clearly spelt out in Clause 1, namely that the Claimants should use their *"best efforts to dispose of NBG's interest in the Finansbank Group"*.

88. I conclude, therefore, that the relevant *"Exit Event"* in this case was the execution of the SSPA on 21 December 2015. It follows that *"the last Equity Book Value*

published in accordance with the BRSA standards before the Exit Event" (*"D"* in the Appendix to the IFAs) was that which was published on 30 September 2015, namely TL9,099,950,000.

Issue (iii): what is the correct approach to the applicable currency exchange rate when comparing the *"Exit Value"* and the *"Equity Book Value"*?

89. It is precisely because this *"Equity Book Value"* is denominated in Turkish Lira that issue (iii) arises – more specifically still, because NBG solicited bids for the sale of its stakes in Finansbank and Finans Leasing denominated in Euros and, as a result, the bulk of the consideration which QNB agreed to pay NBG under the SSPA to acquire the Finansbank shares was stated in Euros and ultimately paid to NBG in Euros. It follows that, as both Mr Valentin and Mr Parker agreed, in order to perform any meaningful comparison between the *"Exit Value"* and the *"last Equity Book Value"* in accordance with the Appendix, it is necessary to identify the date on which any currency exchange calculation is to be performed.

90. To reiterate, the Claimants' position on this is that there should be a conversion of the *"Equity Book Value"* from Turkish Lira to Euros by reference to the TL-€ exchange rate applicable on the accounting date which, as a result of my determination in relation to issue (iv), is 30 September 2015. NBG, on the other hand, contends that the correct approach is to carry out the relevant conversion either on the date of *"Completion"* on 15 June 2016 (and so on the date when *"Exit Value"* is achieved in the sense that NBG has received payment for its shares) or on the date when the SSPA was entered into (21 December 2015) and to convert the *"Exit Value"* from Euros to Turkish Lira. To be clear, as Mr Parker pointed out in closing and as ultimately Mr Valentin appeared to acknowledge, which way round the conversion is carried out (from Turkish Lira to Euros or from Euros to Turkish Lira) does not matter; what matters, as Mr Parker put it, is *"the timing of the date"* rather than *"the direction of travel"*.

91. In support of NBG's case, Mr Parker emphasised that, in accordance with the definition of the term in the IFAs, the *"Exit Value"* was not the price which QNB agreed to pay for NBG's shares but *"the consideration paid in respect of an Exit Event"*. He did so in order to make the point that what actually came to be paid might not be the same as the *"Purchase Price"* for the shares stated in Clause 2.1 of the SSPA (€2.75 million on the assumption that Finansbank owned 100% of the shares in Finans Leasing) since the price actually to be paid to NBG was subject to adjustment under the terms of the SSPA. He gave as an example Clauses 5.1 and 5.2 of Schedule 14 to the SSPA which provide that, following the conclusion of the SSPA, an audit of Finansbank's net asset value as at 30 September 2015 was to be carried out and, insofar as this was lower than stated, the price would fall to be reduced. He referred also to the provisions (Clauses 6.4 and 6.5) concerned with *"Leakage"* prior to the closing date which envisaged monies being deducted from the price to reflect the *"Closing Leaking Deduction"*. In view of this, Mr Parker went on to submit, it cannot be known what the *"Exit Value"* was in Turkish Lira (as opposed to Euros) until the date of payment by QNB to NBG. It follows from this, Mr Parker submitted, that in order to make the comparison demanded by the Appendix to the IFAs (namely the comparison between *"the value of the Company by reference to the Exit Value"* (*"C"*) and the *"last Equity Book Value published in accordance with the BRSA*

standards before the Exit Event" (*"D"*)), it is likewise necessary to carry out the conversion as at the date of payment, and not before. It was Mr Parker's submission that, on the other hand, if the last accounts date were to be taken as the conversion date, the question would become a different inquiry to that envisaged by the Appendix since it would involve asking whether the price paid would have represented a 'premium to book' value had it been paid over eight months earlier - assuming that, as I have decided, the *"Exit Event"* is the date when the SSPA was entered into and so that the relevant book value is as at 30 September 2015. Mr Parker suggested that that question cannot have any relevance to whether the Claimants should be entitled to a Fee.

92. NBG's essential position, therefore, was that the Appendix comparison requires (implicitly given that the Appendix actually says nothing about currency differences) the currency exchange to be performed whenever the *"Exit Event"* is determined to be (21 December 2015) and not the date of the *"last Equity Book Value published in accordance with the BRSA standards before the Exit Event"*. That this is, indeed, NBG's position was demonstrated by what Mr Parker had to say in an email to the Court sent on 8 May 2018, and so after the trial had come to an end, which attached a diagram *"to demonstrate that it makes no difference whether the 'Equity Book Value' is converted into Euros on 30 September 2015, or the 'Exit Value' is converted into Turkish Liras on that date"*. The diagram showed, unsurprisingly, that whether the conversion is done from Turkish Lira to Euros or the other way round, the result is the same provided that the conversions are done on the same dates. More significantly for present purposes, it was Mr Parker's submission that *"If the FX date is 30 September 2015, one is always effectively asking whether the Exit Value would have constituted a premium to book value had it been agreed (or paid) on 30 September 2015 itself"*. As Mr Valentin pointed out, however, in a note which he prepared containing the Claimants' *"observations"* on the diagram, NBG's position overlooks the simple fact that the formula for the determination of *"A"* in the Appendix expressly requires a comparison to be made between two things which were almost inevitably going to be on different dates, namely *"the value of the Company by reference to the Exit Value"* (*"C"*) and the *"last Equity Book Value published in accordance with the BRSA standards before the Exit Event"* (*"D"*). It is theoretically possible that the two dates could be the same but it is somewhat unlikely that a purchaser in QNB's position would be willing to enter into a sale agreement without looking into the most recent book value of the company and taking time to do this properly. It follows that I agree with Mr Valentin's submission on this point and not Mr Parker's submissions. I am clear that the right approach in a case such as the present, where different currencies are involved and where the IFAs are themselves silent on the issue, is to ask what a reasonable person, with the parties' background knowledge, would have understood the parties to have intended at the time that the IFAs were entered into. In my view, the answer to that question is clear: that the only viable date on which to convert the *"last Equity Book Value"* (*"D"*) is the relevant book date, namely 30 September 2015. To approach the matter in any different way would be to distort the formula contained in the Appendix to the IFAs since the comparison would no longer be between *"C"* and *"D"* (a figure based on a 30 September 2015 book value) but between *"C"* and something other than *"D"* (a figure based on a 30 September 2015 book value which has, crucially, undergone a revision based on a conversion carried out on some other date altogether). This is for an obvious reason: taking a different date (and so a different exchange rate) would introduce whatever currency

fluctuations there will have been between 30 September 2015 and the later date used for exchange purposes. Put simply, it seems obvious to me that, in order to work out what the equivalent Euro figure is for *"D"*, the book value as at 30 September 2015, it is necessary to carry out the currency conversion from Turkish Lira to Euros on that date rather than on some other date since taking some other date will not produce an equivalent Euro figure but instead some other figure altogether, namely a value which is not reflective of the actual value of Finansbank as at 30 September 2015 and not, for this reason, the Euro equivalent of the Turkish Lira book value as at that date.

93. Although I do not place too much reliance on it, there is a further point which should not be overlooked. This is that the approach adopted by the Claimants means that it was able to be known by NBG (and the Claimants also once they learned of the price agreed with QNB under the SSPA) from an early stage what amount in Euros would need to be achieved in terms of *"Exit Value"* in order to meet or exceed the *"last Equity Book Value"*. All that needed to be done was to carry out a conversion from Turkish Lira to Euros as at 30 September 2015. On NBG's approach, however, there would be no such ability since it would only be when the *"Exit Value"* was converted from Euros to Turkish Lira on the *"Exit Event"* (on NBG's primary case on completion and, in any event, not earlier than 21 December 2015 when the SSPA was entered into) that it would be possible to perform the relevant calculation given the inevitable exchange rate fluctuation which will have occurred in the meantime. Mr Parker dismissed this point in his closing submissions, observing that there is no reason why it would not be possible to perform a calculation in December 2015, just as NBG was about to enter into the SSPA and so with knowledge of the price to be agreed with QNB, by reference to the *"Equity Book Value"* on 30 September 2015 but using a currency exchange rate as at December 2015 rather than 30 September 2015. The answer, however, is that until such time as the SSPA has been entered into (on NBG's alternative case) or until such time as there has been completion (on NBG's primary case), any such comparison is necessarily not as certain as a calculation which uses a (fixed) currency exchange date of 30 September 2015.

94. I would just add that I am unswayed from the conclusion which I have reached on this issue by Mr Parker's reliance on the fact that in QNB's Binding Offer letter dated 23 November 2015 the exchange rate used to compare the price offered with Finansbank's net book value was not the one prevailing on 30 September 2015 but a different rate (3.0494) - probably the date on which QNB was making its offer. Although Mr Parker characterised the use of a different exchange rate in the Binding Offer as *"destructive"* of Mr Valentin's submissions on the appropriate date to use for exchange purposes, it does not seem to me that this really assists me in interpreting the IFAs in circumstances where these are, after all, contracts made not between QNB and NBG but between the Claimants and NBG.

95. I conclude, therefore, that the correct approach in this case is to convert the *"Equity Book Value"* from Turkish Lira to Euros as at 30 September 2015. Taking the *"Equity Book Value"* as at that date, TL9,099,950,000, and converting this into Euros, again as at that date, at the then applicable exchange rate, 3.4212 TL-€, results apparently in *"D"* equating to €2.659 billion. Taken together with the conclusion which I have reached as to issue (iv), the consequence, Mr Valentin pointed out and Mr Parker did not dispute, is that the value of *"A"* is greater than one (1), and a Fee is payable irrespective of whether the Claimants are right also about issues (i) and (ii). I come

on, however, now to consider those issues since they have a bearing on the size of the Fee which is recoverable by the Claimants.

Issue (i): whether *"the value of the Company by reference to the Exit Value"* includes the US$910 million in respect of the Subordinated Debt

96. The first of these issues is concerned with the Subordinated Debt and so the US$910 million which NBG received from QNB in relation to that.

97. The starting point here is that the *"Exit Value"* is defined in the IFAs as being *"the aggregate value of the consideration paid in respect of an Exit Event …"*. On this basis, since, so Mr Valentin suggested, the refinancing of NBG's Subordinated Debt was an integral part of the transaction entered into with QNB and so formed part of the *"aggregate value of the consideration paid in respect of an Exit Event"*, as demonstrated by the fact that confirmation that this debt would be refinanced as part of the transaction was specifically identified in the Phase I letters sent out to potential bidders (including QNB), and by the further facts that QNB's Binding Offer letter contained the requisite confirmation and the Subordinated Debt formed part of the SSPA. Mr Valentin went on, in this context, to make the point that the only reason that the transfer was addressed separately in the SSPA, rather than within the *"Purchase Price"*, was that a separate agreement was required to carry out the transfer and, since it was denominated in US Dollars, payment was to be made in that currency to a US Dollar denominated bank account. Mr Valentin relied, for these purposes, upon how Dr Aras put things in his witness statement, as follows:

"… there was no market for the par value sale of NBG's Subordinated Shareholder Loans on their own. NBG was aware of this and thus made it a condition of the sale of the companies in the Finansbank Group that the purchaser would also have to purchase the Subordinated Shareholder Loans. The two items were therefore bundled together as part of the same transaction in such a way that the value which NBG received for the Subordinated Shareholder Loans clearly formed part of the consideration which it received for the overall transaction."

98. The difficulty with these submissions, however, is that they do not square with the wording used in the IFAs themselves. It can hardly be overlooked that the reference to *"the consideration paid in respect of an Exit Event"*, when read in conjunction with the definition of *"Exit Event"* and, through that, the definition of *"Total Exit Event"* (or, for that matter, *"Partial Exit Event"*) means, in effect, consideration paid in respect of the disposal of NBG's <u>shares</u> in *"The NBG Holding"* which, in turn, means *"NBG's holding of ordinary shares of common stock and the founders' shares in the Company [Finansbank] as at the date of this Agreement"*. In short, the consideration with which the IFAs were concerned is consideration paid by a purchaser to NBG in return for receiving NBG's <u>shares</u> in Finansbank. The focus of the IFAs is, accordingly, very specific, making it difficult to see how it can be right to broaden that focus so as to encompass not only NBG's shares in Finansbank but also the Subordinated Debt. Although Mr Valentin submitted that NBG's approach involves a *"strained interpretation"* of the wording contained in the IFAs, that is not a criticism which, in my view, is warranted. On the contrary, it seems to me that it is the *Claimants'* position which strains the wording used by seeking to read into the IFAs words which not only are not there but which, were they to be treated as being

included, would necessarily expand the ambit of the words actually used in a significant respect. That would not be appropriate, however much Mr Valentin might suggest that NBG's position ignores *"the commercial reality of the transaction"* in which NBG made the purchase of the Subordinated Debt a condition of the sale of Finansbank. However integral the sale of the Subordinated Debt might have been to the sale concluded in the SSPA, the fact remains that, as Mr Parker submitted, the Subordinated Debt was a quite different asset from the shares which NBG held in Finansbank.

99. Four further considerations should also be borne in mind. The first is that, as Mr Parker pointed out, the Subordinated Debt was in existence at the time that the IFAs were entered into. Accordingly, had the intention been that the consideration received in respect of the Subordinated Debt should also be included within the scope of the IFAs, this could very easily have been stated in the IFAs. That this was not done, and instead the only reference was to the shares held by NBG in Finansbank, is telling and, in my view, fatal to the submissions which Mr Valentin advanced on this issue. Secondly it is also worthwhile testing the position by asking what the position would be were the Subordinated Debt to have been sold not to QNB as part of the SSPA but to a third party (whether at the same time as the SSPA was entered into or at another time altogether and whether before or after the SSPA) and without the sale of the Subordinated Debt forming any part of a share sale. In that event, there could be no question of the sale of the Subordinated Debt amounting to a disposal for the purposes of the IFAs, and so of the sale having anything to do with *"C"* (the *"value of the Company by reference to the Exit Value"*). I struggle to see why it should make a difference that the Subordinated Debt was sold at the same time as NBG sold its shares in Finansbank to QNB. On the contrary, since the Claimants would not have been entitled to a Fee under the IFAs had the Subordinated Debt been sold separately, it would make no sense at all if they were entitled to a Fee simply because the Subordinated Debt was sold at the same time as NBG sold its shares to QNB.

100. This last point leads on to a third. This is that, in any event, it is open to some doubt (even assuming that it is a material consideration when seeking to construe the IFAs given that it is a post-contract matter) whether it really was the case that the sale of the Subordinated Debt was as integral to the sale to QNB as Mr Valentin suggested. This is because, whilst it is the case that NBG sought offers which related not only to its shares in Finansbank but also which covered the Subordinated Debt, Mr Mylonas was clear in the evidence which he gave that it was not, as he put it, a *"necessary condition"* that NBG should sell the Subordinated Debt at the same time as the shares in Finansbank. He explained the position as follows when being cross-examined by Mr Valentin, specifically having been asked why his position was that the Subordinated Debt and the Finans Leasing shares were not a *"necessary condition"* given that bids had been solicited on a basis that they should contain confirmation that the Subordinated Debt would be refinanced and that the Finans Leasing shares would be bought:

"I mean, our wish was for a clean exit. Our wish was to sell at a very good price and to get back the funding, both the sub-debt as well as the other funding. That was our wish.

Now, if it didn't come out and we had to sell the bank but they were not willing to refinance the sub-debt, that was -- we would have to live with that. Again, we go back, we needed capital. Our main goal was capital. We were short billions of dollars of capital. Liquidity, we were already getting liquidity from the emergency funding facility of the Central Bank, we were borrowing something like 14 billion, 15 billion. 900 for a bit longer was not going to be the end of the world."

He, then, having been asked further about the Finans Leasing shares specifically, said this:

"Everything was negotiable, everything is negotiable with the bidder. We're talking on the one hand the sale of a several billion dollar asset versus something that was worth 39 million. At the end of the day, if we had to be stuck as a minority shareholder in Finans Leasing, a leasing company in Turkey, so be it. I mean, that is not going to break the deal for the sale of Finans. ... Our preference was for a clean exit, but we were not going to sacrifice the sale of - - in the 2.7 billion of capital for these minor issues."

Mr Mylonas clarified that by *"minor issues"* he meant the Finans Leasing shares rather than the (substantial) Subordinated Debt but continued by saying this:

"First order of magnitude the sale of the shares. Second the 900 million of equity. But significantly less, we would do that at a later stage. Anyway, these things were going to mature, so we were going to get repaid at some point. Don't forget that this was debt issued by Finans, held by NBG, and this was going to be debt issued by Finans, owned by QNB. This was not going to be a risky asset, okay, so this was going to be a very nice asset. We would have preferred to get the liquidity undoubtedly, but if things turned out, we could have stuck with it."

101. Furthermore and fourthly, looking at the commercial common sense of the matter, I agree with Mr Parker when he submitted that it is difficult to see why the *"value of the Company by reference to the Exit Value"* should be regarded as including the price paid for the Subordinated Debt in circumstances where the formula in the Appendix to the IFAs requires that a comparison be performed between Finansbank's equity book value and *"the value of the Company by reference to the Exit Value"*. The latter requires not simply that the *"Exit Value"* is looked at, without more, but that *"the value of the Company"* is ascertained *"by reference to the Exit Value"*. As Mr Parker submitted, this means that if NBG had, for example, sold only 80% of its shares in Finansbank (and so that the price paid, the *"Exit Value"*, was for that proportion of shares rather than NBG's entire shareholding in Finansbank), then, *"the value of the Company"* for the purposes of establishing what *"C"* comprises would be the price paid (the *"Exit Value"*) grossed up to give a hypothetical value for 100% of the shares in Finansbank. Put differently, the formula in the Appendix to the IFAs requires a comparison between what might be described as '100% values', namely *"C"* (*"the value of the Company"*) and *"D"* (Finansbank's *"last Equity Book Value"*). That *"C"* must be a '100% value' necessarily follows from the fact that *"D"* is a '100% value' since, unless both *"C"* and *"D"* are each a '100% value', the comparison would involve a mismatch which would make it worthless as the 'price to book' comparison which the formula obviously envisages. It follows from this that, as Mr Parker submitted, it is only insofar as the money paid to NBG under the SSPA

constituted the consideration for NBG's shares in Finansbank that an assessment can be made as to whether those shares were sold at a 'premium to book' value. Put another way, to include a payment in respect of the Subordinated Debt, another asset rather than shares, would be to introduce an element which has no proper place in the calculation since that payment does not impact upon, or in any way reflect, the *"value of the Company"*. Indeed, if the price paid for the Subordinated Debt were to be included as part of *"C"*, the comparison with *"D"* (the *"last Equity Book Value"*) would mean that the comparison was no longer the 'like for like' comparison which the Appendix to the IFAs requires should be carried out. This would not only make no sense when seeking to arrive at a figure for *"A"*, but it would also make no sense in relation to the comparison which is then required between *"A"* and *"B"* since it will be recalled that *"B"* entails looking at the market capitalisation of two comparator banks where the focus is on the price at which shares are trading and nothing other than that. It follows that it would be quite illogical if *"A"* were to include any element which is not referable to share value.

102. My conclusion, in the circumstances, is that the Subordinated Debt ought not to be included in *"C"*, namely as part of *"the value of the Company by reference to the Exit Value"* for the purposes of performing the calculations required by the Appendix to the IFAs.

Issue (ii): whether *"the value of the Company by reference to the Exit Value"* includes the €38,887,000 in respect of Finans Leasing

103. This brings me, admittedly in a somewhat roundabout way, to issue (ii) and the question of whether *"the value of the Company by reference to the Exit Value"* includes the €38,887,000 which QNB paid to NBG under the SSPA in respect of Finans Leasing.

104. Mr Parker submitted that, in essence, the position is similar to the position in relation to the Subordinated Debt: that money paid by Finansbank for NBG's shares in Finans Leasing was not part of the consideration paid in respect of the disposal of NBG's shares in Finansbank, and so should not be taken into account in applying the formula contained in the Appendix to the IFAs. In this regard, he made the point, as he did in relation to the Subordinated Debt, that the monies were paid for an entirely different asset, namely the shares which NBG directly held in Finans Leasing. Indeed, he pointed out, the monies were not even paid by QNB but by Finansbank itself. He also highlighted, again as he did in relation to the Subordinated Debt, that NBG held the shares in Finans Leasing at the time that the IFAs were entered into, observing that, if the parties had intended that the price paid for the shares in Finans Leasing should be included as part of the *"Exit Value"*, the IFAs would, and could easily, have said so.

105. Although, as I shall come on to explain, I agree with Mr Parker's central submission that the Finans Leasing element of the SSPA is not covered by the IFAs, it nonetheless seems to me that the position in relation to the Finans Leasing shares is not entirely on all fours with the position in relation to the Subordinated Debt. As Mr Valentin pointed out, it was always intended that NBG would sell its shares in both Finansbank and Finans Leasing. This is reflected, indeed, in NBG's Phase 1 letter, QNB's Binding Offer and the SSPA itself. Whilst the same can be said concerning the Subordinated Debt, the difference is that the sale in relation to Finans Leasing was a

sale of shares rather than something else altogether. Moreover, it was at all times expressly contemplated that the Finans Leasing shares would be transferred to Finansbank before completion of the sale to QNB took place. That, indeed, was the basis on which QNB made its Binding Offer. It was also how the Purchase Price payable by QNB under Clause 2 of the SSPA (€2.75 billion) was arrived at with the assumption being that Finansbank would own the Finans Leasing shares by the time that completion took place. It was only after the SSPA had been entered into that, on 16 February 2016, NBG notified QNB that it had transferred its Finans Leasing shares to Finansbank and received consideration with the Euro equivalent value of €38,886,563.04. In the same letter, NBG gave notice that it was treating this as *"Leakage"* under Clause 6.2 of the SSPA, meaning that this amount would, therefore, be deducted from the price payable by QNB on completion. The commercial reality, with which Mr Mylonas did not really quibble when asked about it in cross-examination, is that NBG ultimately ended up receiving €2.75 billion, as agreed in the SSPA, albeit that, in the event, it was Finansbank which paid NBG for its 29.87% stake rather than QNB, hence the reduction in the consideration passing from QNB to NBG. The only difference, in truth, if not in substance, was one of timing since the net effect was the same as had been agreed: NBG received the full €2.75 billion but, as regards the Finans Leasing element, through Finansbank rather than directly from QNB. As Mr Valentin explained, the characterisation of the acquisition by Finansbank of NBG's Finans Leasing shares as *"Leakage"* under the SSPA, whilst correct, was somewhat artificial in circumstances where, as a result of Finansbank acquiring NBG's 29.87% stake in Finans Leasing, the value of Finansbank rose by the value of the Finans Leasing shares which Finansbank thereby came to own, and so by an amount equivalent to the payment which Finansbank made to NBG for those shares. For these reasons, I have no difficulty in concluding that what ultimately happened as regards the Finans Leasing shares was, broadly at least, as NBG and QNB had agreed when entering into the SSPA. That, however, does not answer the separate question of whether the *"aggregate value of the consideration paid"* by QNB was, in all respects, *"in respect of an Exit Event"*, so as to mean that the full €2.75 billion (including the €38,886,563.04 in respect of the Finans Leasing shares) counts as the *"Exit Value"*.

106. That question depends on whether the Finans Leasing shares element constitutes an *"Exit Event"* which, in turn, depends on whether it would be appropriate to treat the sale of those (Finans Leasing) shares as amounting to a *"disposal by NBG"* of shares in *"The NBG Holding"* (defined as *"NBG's holding of ordinary shares of common stock and the founders' shares in the Company as at the date of this Agreement"*). In my view, this would not be appropriate for a very simple reason: *"the Company"* in the definition of *"The NBG Holding"* is not Finans Leasing but is Finansbank, which means that any disposal of shares in Finans Leasing does not come within the definition of *"Exit Event"* and so the €38,886,563.04 cannot qualify as *"consideration paid in respect of an Exit Event"*.

107. None of the submissions which Mr Valentin advanced provides an answer to this analysis. That, in my view, is because there is no satisfactory answer. In particular, the fact that, as Mr Valentin highlighted, Clause 1 of the IFAs is expressed in somewhat more general terms than the *"Exit Event"* definition, referring to the Claimants being incentivised to use their *"best efforts to dispose of NBG's interest in the Finansbank Group, directly or indirectly"*, does not justify treating that definition

as applying more generally to other companies within the Finansbank Group besides Finansbank. The more so, in circumstances where it is to be noted that the second paragraph of Clause 3 of the IFA entered into between Dr Aras and NBG expressly contemplates that NBG and Dr Aras might *"agree and covenant to negotiate in good faith and execute additional agreements to provide the Executive with an opportunity to earn an incentive fee linked to the disposal of the Company's shares in its subsidiaries"*. This is wording which demonstrates that the *"Exit Event"* definition was intended very deliberately to be confined in scope to Finansbank itself, and not other companies within the Finansbank Group (including, therefore, Finans Leasing). In relation to other such companies, there would need to be a further agreement entered into. The fact that this additional wording does not appear in the other two IFAs makes no difference since plainly the IFAs need to be construed in a consistent manner.

108. Although Mr Valentin was inclined to suggest that Mr Parker's submissions on this topic *"ignore commercial reality and, in effect, advocate 'a literalist exercise focused solely on a parsing of the wording of the particular clause'"*, as Lord Hodge put it in ***Wood*** at [10], I reject that criticism since the fact that the *"commercial reality"* of the sale to QNB did not, in substance, change when Finansbank purchased the Finans Leasing shares from NBG (instead of QNB purchasing the shares directly from NBG) has no bearing on the construction which is appropriately to be accorded to the IFAs. The construction question hinges not on what, in the event, happened when NBG entered into the SSPA with QNB or in the lead-up to completion of the sale, but on what the parties should be taken as having agreed when they entered into the IFAs. What they agreed, as I have explained, was that the Claimants should receive a Fee where there had been a relevant *"Exit Event"*, and a sale of shares held by NBG not in Finansbank but in Finans Leasing does not, in my view, amount to an *"Exit Event"* for the reason which I have given. Simply because that sale formed part of a sale involving shares in Finansbank does not change matters, any more than would such a sale do so if it had been entered into independently.

109. I conclude, therefore, that (like the Subordinated Debt) the Finans Leasing element ought also not to be included in *"C"* for the purposes of performing the calculations required by the Appendix to the IFAs.

Estoppel by convention

110. I come on, lastly, to deal with the Claimants' estoppel by convention case. I do so for completeness, not because anything turns on the issue in view of the conclusions which I have reached in relation to the primary way in which the Claimants have advanced their claim.

Applicable legal principles

111. There was no real issue between Mr Valentin and Mr Parker as to the relevant legal principles. In short, an estoppel by convention arises if (i) there is a relevant assumption of fact or law, either shared by both parties (or made by party B and acquiesced in by party A), and (ii) it would be unjust to allow party A to go back on that assumption.

112. The principles applicable were summarised by Lord Steyn in ***Republic of India v India Steamship Co Ltd (No 2)*** [1998] AC 878 at page 913E-G in this way:

"It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption ... It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

113. The principles were helpfully further explained by Briggs J (as he then was) in ***HM Revenue & Customs v Benchdollar*** [2009] EWHC 1310 (Ch), [2010] 1 All ER 174 at [52] (as applied in subsequent cases such as ***Mitchell v Watkinson*** [2014] EWCA Civ 1472 and ***Dixon v Blindley Heath Investments Ltd*** [2015] EWCA Civ 1023, [2017] Ch 389), as follows:

"... (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

114. In order to found an estoppel (whether by convention or by representation), Mr Parker submitted, relying upon what Jacob LJ had to say in ***SmithKline Beecham plc v Apotex Europe Ltd*** [2007] Ch 71 at [102], that the assumption (in the case of the former) or the representation (in the case of the latter) must be *"unambiguous and unequivocal"* since that *"is inherent in the very nature of an estoppel"*. Mr Parker submitted that this requirement stands notwithstanding that in ***ING Bank NV v Ros Rosa SA*** [2011] EWCA Civ 353, [2012] 1 WLR 472, when considering a submission to the effect that the shared common assumption must be sufficiently certain, Carnwath LJ (as he then was) described there being a qualification as far as estoppel by convention is concerned. Specifically, explaining that the submission under consideration arose out of a passage in the judgment of Ralph Gibson LJ in ***Troop v Gibson*** [1986] 1 EGLR 1 at page 6D-F, Carnwath LJ stated as follows at [64(ii)]:

"... With respect, I find more persuasive the way in which the point was expressed in the leading judgment of Sir John Arnold P. After referring to the extensive argument on the need for a 'representation' to be clear and unequivocal to found an estoppel, he said that the same question did not arise in relation to estoppel by convention:

'Since this is of a consensual character and the terms of the convention, just as those of a contract once the language is established by the evidence, must be interpreted by the court and the only true meaning is that decided upon by the court.' …".

115. Mr Parker submitted that this apparent conflict between two decisions of the Court of Appeal (three, if ***Troop*** is itself included) ought to be resolved by the Court favouring ***SmithKline Beecham***, an authority which it appears was not cited to the Court of Appeal in ***ING Bank***. His submission was that the analogy with a contract favoured by Sir John Arnold P in ***Troop*** (and approved by Carnwath LJ in ***ING Bank***) is inapposite in an estoppel by convention case where the inquiry is as to the parties' conduct (or assumption) rather than as to what the language used in a contract means. Whether there is, indeed, a conflict, however, as suggested by Mr Parker is something about which I am not convinced since it seems to me that, in truth, what is required (consistent with all three authorities) is that there is clarity over what comprises the common assumption (if there is such a common assumption) as determined by the Court and not by the parties. If there is no such clarity, then, there will be no relevant convention and so no operable estoppel. In any event, as Mr Valentin acknowledged, the present case is not a case which turns on such subtleties.

116. Lastly as to the relevant principles, specifically that identified by Briggs J in ***Benchdollar*** at [52(i)], it is clear that there does not need to be an expression of accord between the parties. On the contrary, as Hildyard J (sitting in the Court of Appeal) explained in ***Dixon*** at [92]:

"As to (i) above, we do not think there must be expression of accord: agreement to the assumption (rather than merely a coincidence of view, with both proceeding independently on the same false assumption) may be inferred from conduct, or even silence (see per Staughton LJ in "The Indian Grace" [1996] 2 Lloyds Rep 12 at 20). However, something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption."

The present case

117. The assumption of fact relied upon by the Claimants in the present case was made, they allege, when, in July 2015, the Claimants executed the extensions to their employment agreements, specifically surrendering the *"Change of Control"* provision which those contracts had previously contained, and consisted of a common assumption that, on the sale of Finansbank, they would each be entitled to receive a Fee under their respective IFAs allied with an assumption that NBG would not subsequently contend that no Fee was payable on any of the bases now relied upon in its Defence in these proceedings.

118. Mr Valentin submitted that, when the IFAs were originally executed, there was no prospect that NBG would sell its stake in Finansbank at less than book value because Finansbank was trading at significantly over book value. Mr Valentin relied, for these purposes, on Dr Aras's evidence in his witness statement that *"our discussions assumed that the Bank would be sold at substantially over book value"*. He submitted that that remained the position in the Spring of 2015 when, according to Dr Aras, NBG's senior management (including Mr Mylonas) expressed the view to him that NBG would not sell Finansbank at below book value. Furthermore, Mr Valentin

suggested, in negotiating the extended employment contracts in July 2015, Mr Mylonas explained that, in the event of a sale, the Claimants would become entitled to an incentive fee under the IFA, so giving Dr Aras, in particular, confidence that he would be entitled to receive a fee, as there were no circumstances in which NBG would sell Finansbank at below book price. Mr Valentin submitted that the fact that *"there are other possibilities in life that do not materialise at all"*, as Mr Guzeloglu put it when giving his evidence, does not detract from the clarity of the evidence to the effect that NBG would never permit a sale to take place at below book price. Mr Valentin also highlighted Mr Mylonas's evidence that, despite knowing that it was Dr Aras's assumption that there would be dire consequences if NBG ever sold below book value, he never told the Claimants that NBG was going to sell Finansbank at below book value.

119. It was Mr Valentin's submission that, in such circumstances, it would be unjust to allow NBG to go back on the common assumption (which it encouraged the Claimants to make when agreeing to their revised employment agreements) for a number of reasons: first, because, following discussions with NBG, the Claimants entered into their extended employment contracts, removing the *"Change of Control"* provision, on the basis of that assumption, thereby foregoing the substantial benefits that would have accrued to them had they been able to exercise their contractual rights following a sale and, secondly, because NBG shared the assumption, as demonstrated by its entry into the QNB Side Letter, which was only necessary if NBG believed that a Fee was payable. For these reasons, Mr Valentin submitted that NBG should be treated as being estopped from contending that no Fee is payable by advancing the interpretation of the IFAs which they put forward at the hearing.

120. This is not a submission which I can accept. I am quite clear, on the contrary, that the Claimants' estoppel case is wholly unsustainable. Mr Parker submitted, and I agree, that it had simply not been established, on the evidence, that there was the common assumption alleged, namely that *"there were no circumstances in which [NBG] would sell Finansbank at a price which was below its equity book value"*. This is the case for several reasons. First, the alleged common assumption is inconsistent with the fact that the IFAs themselves plainly contemplated the possibility that Finansbank might be sold for less than its book value. As Mr Parker submitted, if Mr Valentin's argument were right, then, it is difficult to see why the IFAs would have contained this wording in the Appendix:

"PROVIDED THAT, and for the avoidance of doubt, no fee will be payable if A is less than 1 (one)"

This was, Dr Aras himself fairly accepted, *"an important part of the overall mechanism for the payment of a fee"*. Indeed, when it was put to him in cross-examination that NBG *"wouldn't need to protect themselves against something that couldn't possibly happen"*, he agreed with that proposition and, furthermore, that, *"although Finansbank was profitable and successful at the time, it was always possible that in the future it would be less profitable and NBG shares might be sold for less than book value"*. As Mr Parker rightly observed, there was no change in circumstances between the date of the IFAs and the date of the negotiations in June 2015 which could have led the Claimants to believe that it was no longer possible that Finansbank could not be sold for less than its book value. It must, accordingly, have

remained possible, in June 2015, that Finansbank could be sold for less than its book value. The point goes further than that, however, since, again as Mr Parker submitted, NBG had, in the meantime, come under an obligation to dispose of its shares in Finansbank. Dr Aras was clear, coming into the hearing, that the EU had by July 2014 *"required [NBG] to decrease its shareholding in Finansbank to strengthen its capital position"* and that its need to do so was *"increasingly urgent"*. In cross-examination, he agreed that by July 2014 it had become clear to him that NBG might be forced to sell at least some of its shares in Finansbank even if it was unhappy with the price that was going to be paid. By the following Spring, Dr Aras explained in his witness statement, this had become a *"political imperative"*, Dr Aras explaining in cross-examination that by that time NBG was preparing to sell all of its shares in Finansbank. Clearly, in those circumstances, NBG was in no position to ensure that the price would be at a premium to book value since the price achieved would depend upon a range of extraneous factors, including the performance of Finansbank and the market conditions at the time of the sale.

121. Moreover, it is, at a minimum, doubtful that the matters relied upon by the Claimants apparently as demonstrating the alleged common assumption do so. One such matter was the statement said to have been made in conversations with Mr Mylonas and Mr Tourkolias, NBG's Chief Executive Officer, earlier in 2015 that there would be *"dire political consequences if NBG sold Finansbank for anything less than its book value"*. In this respect, Mr Valentin pointed out in closing that Mr Mylonas himself accepted in his witness statement that *"We all certainly made clear to Dr Aras that NBG wanted to sell Finansbank for as much as possible and that we would be seriously criticised if it were sold for less than book value"*. Furthermore, it was Dr Aras's evidence, which I accept, that, when Mr Fragiadakis replaced Mr Tourkolias as Chief Executive Officer, he made essentially the same point when he observed that *"they will hang me in Syntagma Square if I sell Finansbank below book value"*. Mr Valentin submitted that this establishes that such a sale (at less than book value) was never going to be allowed to happen. Mr Parker, on the other hand, submitted that the statement shows that such a sale is precisely what might happen since, if there had been no circumstances in which it might happen, it would be unnecessary to speculate as to what the consequences might be. Although I can see merit in both of these positions, it is nonetheless unnecessary to decide which of them I prefer given Dr Aras's acceptance in cross-examination that, whilst NBG did not want to sell at below book value, it was nonetheless possible that NBG might have to do so. The relevant exchange on this issue was the following:

"Q. We've already established that it was possible that NBG might be forced to sell its shares in Finansbank for less than book value. That's right, isn't it?

A. His attitude up until now was that he would never sell below book value.

Q. He obviously didn't want to sell, but you knew, whatever he said, you knew that it was a possibility that NBG might be forced to sell for less than book value.

A. Anything is a possibility, but his intention was not to sell below book value.

Q. No, exactly.

A. That's what he said.

Q. I'm sorry for interrupting, but his intention was not to, but it was possible that he might have to.

A. I guess it is."

122. Nor was the evidence of the Claimants themselves as to the existence of the alleged common assumption exactly compelling. Thus, although Dr Aras referred to his being told prior to Spring 2015 that there would be *"dire political consequences if NBG sold Finansbank for anything less than its book value"*, in his witness statement his evidence as to what was said during the negotiation of the extension to the employment contracts was merely that *"Mr Mylonas reasoned that, in the event of a sale, I would become entitled to an incentive fee under the IFA"* with no suggestion that Mr Mylonas actually told him that there were no circumstances in which Finansbank would be sold for less than book value. In cross-examination, his evidence was no more compelling, as this passage demonstrates:

"Q. Okay, and so to be clear, you were not given any assurance that you would certainly earn an incentive fee?

A. We were told that most likely we will get a significant incentive fee.

Q. Mr Mylonas never actually -- he never said to you, 'There are no circumstances in which NBG will sell Finansbank for less than book value'.

A. At that point in time, I don't recall that, yes."

Similarly, Mr Guzeloglu accepted that he was always aware that it was possible that Finansbank might be sold for less than book value in this exchange:

"Q. It was always possible, wasn't it, that you wouldn't receive an incentive fee under the IFAs?

A. Meaning the price to book value would be below 1 and we won't be entitled to the fees? Is that what you're referring to?

Q. No, that's not what I'm referring to. I was talking about the other requirement in the IFAs that involves the comparison with the comparator banks.

A. Okay. Yes, of course. I mean, if we did not perform and the comparator banks' price to book values were significantly higher than the achieved book value we achieved, we would not get much.

Q. It was possible for you to get nothing. Let's look at –

A. Definitely, definitely. Don't bother yourself. Definitely.

…

A. -- that was one thing. The second thing is for NBG to sell the bank at that kind of a level would be completely politically unacceptable for NBG managers. So those two things, when you triangulate them, led me to believe that it was almost impossible.

Q. Almost impossible, but still actually possible?

A. Obviously. I mean mathematically, theoretically, you are correct."

123. It is not strictly necessary, in these circumstances, to resolve the conflict in the evidence which I have previously mentioned concerning the meeting which took place in Turkey in December 2015. It was Mr Mylonas's evidence that this meeting was on 17 December 2015 and that it involved him telling the Claimants about the sale to QNB which had been agreed and asking them to agree that NBG's obligations under the IFAs should be assigned to QNB. According to Mr Mylonas, the Claimants' response was to say that they would only agree if the condition which meant that a Fee was only payable if *"A"* in the Appendix to the IFAs was a value greater than one (1) was removed. On that basis, as far as Mr Mylonas was concerned, the Claimants understood that Finansbank might be sold for less than its book value. Although Mr Parker highlighted in closing how, when giving his evidence, Dr Aras first said that he did not recall whether Mr Mylonas had asked the Claimants in the meeting on 17 December 2015 to agree to an assignment and only then went on to state that it had not been discussed, I am not persuaded that this criticism is entirely fair, not least because Mr Mylonas himself accepted that he had not disclosed the sale price to Dr Aras at the meeting on 17 December 2015 because the price was confidential. Furthermore, Mr Mylonas went on to agree with Mr Valentin that neither at that meeting nor on any other occasion did he tell Dr Aras (and, implicitly, the other Claimants) that *"we planned to sell at less than book value"* or that *"we were going to"* do that. It is correct to say, as Mr Parker pointed out in closing, that Mr Mylonas went on to maintain that there was a discussion concerning the IFAs at the 17 December 2015 meeting and not later, on 22 December 2015, after the sale to QNB had been announced, as Dr Aras insisted, but that is not evidence which I can accept. I am clear, on the contrary, that Mr Mylonas must have been mistaken in what he had to say on this topic. I agree with Mr Valentin that, in the light of Mr Mylonas's acceptance that he did not tell the Claimants the price which had been agreed with QNB, allied with his acceptance also that he did not tell the Claimants that the sale was at less than book value, it is distinctly unlikely that Dr Aras would have asked Mr Mylonas to remove the condition which meant that a Fee was only payable if *"A"* in the Appendix to the IFAs was a value greater than 1. There would, in short, in such circumstances, have been no reason for Dr Aras to have made such a request at the meeting on 17 December 2015. I, therefore, accept what Dr Aras had to say concerning that meeting and reject Mr Mylonas's evidence concerning it, not because I consider that Mr Mylonas was knowingly giving false evidence but merely because, in my view, he has misremembered what happened at the meeting. I furthermore accept what Dr Aras went on to say concerning a telephone conversation which he had with Mr Mylonas on 22 December 2015, which was that Mr Mylonas called him to say that the sale to QNB had been agreed and that, as part of that sale, it had been agreed that QNB would pay the incentive fees to the Claimants.

124. The fact that I have accepted Dr Aras's evidence on these matters does not, however, change my overall conclusion as to the common assumption which the Claimants

have alleged and on which their estoppel by convention case is founded. This is because, even though Mr Mylonas did not tell the Claimants (whether at the meeting on 17 December 2015 or at any other time) that a sale would be at less than book value, the fact remains that the Claimants themselves recognised that this was a possibility, and that appreciation on the part of the Claimants means that there cannot have been the common assumption which has been suggested. I might add, in this regard, that I am not swayed from this conclusion by Mr Valentin's reliance on the fact that the QNB Side Letter was entered into, something which Mr Valentin submitted was only necessary if NBG believed that a Fee was payable. I agree with Mr Parker that the QNB Side Letter is no evidence of the existence of any relevant common assumption and that the explanation for its being entered into is that NBG sensibly wanted to protect itself against any liability to the Claimants under the IFAs. As Mr Parker highlighted, the QNB Side Letter sets out the terms on which QNB had agreed to pay *"an incentive Fee (the Fee) provided for in the incentive agreements"* (Clause 1.2) rather than stating that a Fee had actually fallen due, or would fall due, for payment. Quite obviously, the agreement between NBG and QNB was that, *if* a Fee was to be payable under the IFAs, QNB would meet the liability. The QNB Side Letter is, therefore, essentially neutral; it certainly does not warrant a conclusion that there was the common assumption which is now alleged.

125. It makes no difference, in these circumstances, whether Mr Mylonas had by this stage (December 2015) reached any view as to whether a Fee was payable, which was what he maintained in his evidence, since all that matters is whether there was the alleged common assumption and I have concluded that there was not. It follows that, although Mr Valentin was dismissive of Mr Mylonas's evidence that he had not personally formed any view on whether a Fee was going to have to be paid to the Claimants, ultimately it does not matter whether he did or not. Mr Valentin again in this regard relied upon the fact that NBG decided to enter into the QNB Side Letter as demonstrating that Mr Mylonas (and NBG) must have appreciated that a Fee was payable. I have dealt with that point already. Otherwise, Mr Valentin suggested that the calculation required to work out whether €2.75 billion was greater than the published book value of Finansbank, converted to Euros as at the TL-€ exchange rate applicable on 30 September 2015, could be performed in about thirty seconds. Whilst that may well be right, it does not, however, justify a conclusion that Mr Mylonas must necessarily have carried out that calculation, not least because it presupposes that Mr Mylonas's thinking at the time was in alignment with how the Claimants put their case on the appropriate construction of the IFAs (and the Appendix) which, although I have accepted the Claimants' submissions on that issue, is not how the case was presented before the Court by NBG, the bank for which Mr Mylonas works. The position is, I am satisfied, as Mr Mylonas explained it in the following exchange with Mr Valentin (as relied upon in closing by Mr Parker)

"Q. Okay, I'm going to come on in a minute and ask you some questions about the discussions that you say in your evidence you had with the claimants about this, but just focusing on the agreement itself for the moment, it was entered into because you knew that the fee was going to be payable and NBG wished to shift responsibility for payment of it to QNB.

A. I didn't know it was going to be payable …

…

A. The interpretation of the incentive agreement clearly could be interpreted in many ways, and that's one of the reasons we're here today, I guess. As a part of the clean exit, I wanted to get rid of this issue, and QNB was willing to take it, that's it.

Q. And in your discussions with QNB, did they ask you what is the position in relation to the fee, in other words is this a real liability or is it just something that's hypothetical?

A. They didn't ask that, they asked for the contract itself, and they looked at it, and they maintained that they would take it.

…

Q. The effect of it is that QNB is responsible for meeting the fees that are due. Is that your understanding of the arrangement at the time, commercially?

A. If any fees are due, it would be QNB.

…

Q. So in order to answer that question, you had to give consideration to whether a fee might be payable.

A. No. The worst possible case is very simple, it's the maximum amount that each of the three claimants would get multiplied by the price. It's 1.04 per cent times the price, so it's a very simple calculation."

In other words, the most that Mr Mylonas did was give thought to the worst case scenario as far as QNB was concerned if the QNB Side Letter was to be entered into.

126. A further reason why I consider it appropriate not to accept Mr Valentin's submissions concerning the alleged common assumption stems from the timing and manner in which the estoppel by convention case has come about, specifically the fact that it was not until earlier this year, when witness statements were exchanged, that the alleged common assumption was first mentioned. There was no mention of it in the Particulars of Claim as originally served in May 2017. Nor was there any mention of it in the Reply which was served in July 2017. Nor was there any mention of it in the Amended Particulars of Claim served in August 2017. Nor was there any mention of it in the Amended Reply served in September 2017. It was only in January 2018 that the point was raised in the witness statement which was made by Dr Aras. This was then followed by re-amendments to the Amended Reply in March 2018 in which the estoppel by convention case was put forward. As Mr Parker submitted, it is somewhat curious that it should take so long for the Claimants to advance a case based on a common assumption which they invite the Court to conclude they themselves held and which they shared, so it is alleged, with NBG. If the common assumption existed, the obvious thing for the Claimants to have done would have been to say so at a much earlier stage. Indeed, as Mr Parker pointed out, it should not be overlooked in this respect that these proceedings were prefaced by exchanges between the Claimants and NBG (or their respective lawyers) in which, although

debate was had concerning how the formula in the Appendix to the IFAs should be approached, there was no mention of any prior understanding that a sale at less than book value was impossible. Again, had there really been the common assumption which was alleged at trial, then, this is a striking omission.

127. Since there was no sufficiently unambiguous and unequivocal common assumption of the type alleged by the Claimants, that is an end to their estoppel by convention case. Even if I had reached a different conclusion on that issue, however, I would have gone on to decide that, in any event, the estoppel by convention case could not succeed. This is because I agree with Mr Parker when he submitted that the Claimants did not, in any event, rely upon the suggested common assumption in agreeing an extension to their employment contracts and, furthermore, that, even if they did, it would not be unconscionable to permit NBG now to maintain that no Fee is payable. The important feature to appreciate in this regard is that the Claimants' existing employment contracts were all due to expire on 31 December 2015. Once those contracts had expired, their right to receive (under Clauses 2 and 14(f)) an *"Early Termination Payment"* in the event of a *"Change of Control"* would also expire. If they had refused any extension to their existing contracts, they would all have expired long before the closing date under the SSPA and long before any *"Change of Control"* arose. Accordingly, in view of how matters turned out, they would have received no *"Early Termination Payment"* in any event and it follows that their existing *"Change of Control"* entitlements were worthless. Mr Guzeloglu accepted this, in terms, as he had to do given that what was being put to him by Mr Parker was plainly correct.

128. Furthermore, again as Mr Parker pointed out during the course of closing (as well as in cross-examination), in agreeing to an extension of their employment contracts, the Claimants received very substantial advantages since, not only did they secure their continued employment with Finansbank (something which, unsurprisingly given their long service, they were keen on doing) on very generous terms, but they also kept their rights under the IFAs. This, in circumstances also where Mr Mylonas only wanted initially to agree an extension of one year but was persuaded to grant a longer extension on the basis that the *"Change of Control"* provisions were removed. In these circumstances, I consider that there is considerable force in Mr Parker's submission that, even if the Claimants did decide to extend their employment contracts in reliance on an assumption that a Fee would certainly be payable under the IFAs, it is difficult to see how it can really be the case that they thereby suffered detriment. Dr Aras, indeed, essentially accepted that this was the case during the following exchange in cross-examination with Mr Parker:

"Q. So faced with the choice between letting your existing contracts expire and agreeing an extension without the change of control provisions, you would obviously have accepted an extension on those terms?

A. Yes, because, as you said, under the IFA we had the expectation of getting a fee at the exit event.

…

Q. But I'm not looking at NBG's position, I'm looking at your position, Dr Aras, that agreeing to an extension of your employment contract on those terms –

A. Yes.

Q. -- was hugely beneficial for you?

A. It was not hugely beneficial, it was beneficial for me ....”

I acknowledge that in his witness statement Dr Aras stated as follows:

“While I was alive to the fact that, by deleting the change of control clause, I was giving up a valuable right, I was also confident, based on my discussions with Mr. Mylonas, that I would be entitled to receive the incentive fee under the IFA in the event of a sale, as there were no circumstances in which NBG would sell the Bank at a price which was below its equity book value. I therefore agreed to the change of control clause.”

I acknowledge also that Mr Guzeloglu had something similar to say. In reality, however, as Mr Parker submitted, since the employment contracts were about to expire, there was no *“valuable right”* to give up.

129. In addition, again as Mr Parker submitted, even if the Claimants had tried to insist upon the retention of the *“Change of Control”* provisions in their extended employment contracts, it seems most unlikely that NBG would, in any event, have gone along with this since (as Mr Valentin himself submitted) NBG would, no doubt, have wished to avoid a situation where the Claimants could all have served notice terminating their employment contracts with effect from 10 August 2016 (as they would have been entitled to do had the *“Change of Control”* provisions been maintained in line with what had previously been agreed), triggering entitlements to the salary and retention payments that would otherwise have fallen due for the remainder of those contracts, with the consequence that QNB, having only just bought Finansbank, would lose its three most senior executives. NBG would inevitably have been alert to the need to avoid this putting off potential purchasers such as QNB. For this reason, I am confident that, however much NBG would have been anxious to retain the Claimants' services, NBG would not have agreed to the *“Change of Control”* provisions being retained, in any event.

130. It follows, for this and the other reasons which I have given, that the estoppel by convention case cannot succeed.

Conclusion

131. I can summarise my conclusions as follows:

(1) The relevant *“Exit Event”* in this case was the execution of the SSPA on 21 December 2015. It follows that *“the last Equity Book Value published in accordance with the BRSA standards before the Exit Event”* (*“D”* in the Appendix to the IFAs) was that which was published on 30 September 2015, namely TL9,099,950,000: Issue (iv).

(2) The correct approach in this case is to convert the *"Equity Book Value"* from Turkish Lira to Euros as at 30 September 2015: Issue (iii).

(3) The Subordinated Debt ought not to be included in *"C"*, namely as part of *"the value of the Company by reference to the Exit Value"* for the purposes of performing the calculations required by the Appendix to the IFAs: Issue (i).

(4) Nor ought the Finans Leasing element to be included in *"C"* for the purposes of performing the calculations required by the Appendix to the IFAs: Issue (ii).

The consequence, it is agreed between the parties, is that each of the Claimants is entitled to be paid a Fee.

132. The precise amounts which are due to each of the Claimants will need to be calculated taking into account what I have decided in relation to issues (i) and (ii). That calculation will need to be agreed in order that an appropriate order can be drawn up accordingly.

133. I am grateful to both Mr Valentin and Mr Parker, and to those instructing them, for the admirable manner in which the case was prepared and presented. This enabled a complex case to be dealt with as efficiently as possible.