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Case No: CR-2018-007982

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: Tuesday 19 February 2019

Before :

MR JUSTICE SNOWDEN

IN THE MATTER OF AVIVA LIFE AND PENSIONS UK LIMITED

**AND IN THE MATTER OF FRIENDS FIRST LIFE ASSURANCE COMPANY
DESIGNATED ACTIVITY COMPANY**

AND IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

Martin Moore QC (instructed by **Slaughter and May**) for the **Applicants**
David Simpson for the **Prudential Regulation Authority** and the **Financial Conduct**
Authority
Liam Doyle (a policyholder) in person

Hearing date: 13 February 2019

Approved Judgment

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

.....
MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. Aviva Life and Pensions UK Limited (“Aviva”) seeks the sanction of the Court under Part VII of the Financial Services and Markets Act 2000 (“FSMA”) to an insurance business transfer scheme (the “Scheme”). Under the Scheme, Aviva will transfer certain of its long-term business written in the EEA to Friends First Life Assurance Company Designated Activity Company, which is its wholly-owned subsidiary incorporated in the Republic of Ireland. After the Scheme becomes effective, that transferee company will be renamed Aviva Life & Pensions Ireland Designated Activity Company (“ALPI”).
2. The purpose of the Scheme is to ensure contract and service continuity for the EEA policyholders of Aviva who are being transferred to ALPI. The Scheme has been proposed to address the concern that Aviva might become unable to service its EEA policies as a result of losing the “passporting” rights under the Solvency II Directive (2009/138/EC, as amended) which currently enable Aviva to rely upon its authorisation in the UK to carry out regulated activities in other EEA Member States. The loss of passporting rights would occur as a result of the United Kingdom’s withdrawal from the European Union on 29 March 2019 without any transitional or other arrangements being agreed in relation to the provision of financial services (a “no-deal Brexit”). Because ALPI is authorised and regulated in Ireland, it will have EU passporting rights and will be able to conduct the transferred business in Ireland and through branches which it will establish in France and Belgium.
3. Subject to sanction, the Scheme is designed to take effect at 22.59 (GMT) on 29 March 2019.

The Parties

4. Aviva is one of the United Kingdom’s largest life insurance and pensions companies. As at 31 December 2017, it had roughly 14.5 million policies and best estimate liabilities (“BEL”) of £227 billion. Its long-term business fund, containing all assets and liabilities allocated to policyholders, currently consists of 16 sub-funds, 13 of which are with-profits funds. The business being transferred by the Scheme is held in a number of these sub-funds.
5. Aviva has reached its current state through a series of mergers, acquisitions and transfers. For present purposes, the most relevant of these was the transfer to Aviva of the business of Aviva Life & Pensions Ireland Ltd pursuant to a scheme sanctioned by the Irish High Court that became effective on 1 January 2015 (the “Irish Scheme”). Following the implementation of the Irish Scheme, the Irish branch of Aviva has been used to write business in Ireland.
6. ALPI was incorporated by Aviva in 1990 to acquire the Irish branch business of Friends Provident Life Office. It subsequently also acquired the Irish business of the National Mutual Life Assurance Company. ALPI’s principal activity is the transaction of long-term insurance business. As at 31 December 2017, it had roughly 160,000 policies and BEL of €4.5 billion. It presently consists of a shareholder fund and 3 other funds (a Closed Fund, a Participating Fund and an Other Business Fund).

7. Following the implementation of the Scheme, Aviva will no longer sell policies to residents in any other EEA country (including Ireland), and Aviva's Irish, French and Belgian branches will be closed. ALPI will continue to sell business in Ireland and continue to accept increments on the policies transferred to it in the same way that Aviva currently does. ALPI will set up two branches in France and Belgium, which will not sell new business but will be set up to mirror the branch structure of Aviva prior to the transfer.

The Scheme in outline

8. The scheme is complex, and I shall therefore simply summarise its key effects.

The Transferring business

9. There are three groups of policyholders that will be transferred from Aviva to ALPI under the Scheme (the "Transferring Business"):
 - i) the with-profits business that was transferred to Aviva under the Irish Scheme and all the with-profits business written out of the Irish branch of Aviva (excluding certain business written in Ireland by CGNU Life Assurance Limited ("CGNU")) (the "With Profits Irish Business"). This business is currently held in Aviva's Irish With-Profits Sub-Fund. As at 30 June 2018, there were 8,462 policies in this category. The BEL as at that date was £703 million;
 - ii) the non-profits business transferred to Aviva under the Irish Scheme and all non-profit business written out of Aviva's Irish branch (excluding CGNU business written in Ireland) (the "Non-Profits Irish Business"). This business is currently held in Aviva's Non-Profit Sub-Fund. As at 30 June 2018, there were 248,016 policies in this category. The BEL as at that date was £5,140 million; and
 - iii) certain business written in France, Belgium, Germany, Iceland, Sweden and the CGNU business written in Ireland under freedom of services or freedom of establishment rules (the overseas life assurance business, abbreviated to "OLAB"). This business is currently allocated amongst six of Aviva's sub-funds. As at 30 June 2018, there were 183,118 policies in this category. The BEL was £956 million.
10. Under the Scheme the Transferring Business will be allocated as follows:
 - i) the With-Profits Irish Business will be allocated to a new fund of ALPI called the Irish WPF;
 - ii) the Non-Profits Irish Business and the OLAB policies that are not with-profits (both currently allocated to Aviva's Non-Profit Sub-Fund) will be allocated to the existing Other Business Fund; and
 - iii) the other policies comprising OLAB will be allocated to newly created funds in ALPI which mirror the funds to which they are currently allocated at Aviva.

The Other Business Fund and the ALPI Irish WPF will be open to new business but all other funds to which policies are allocated under the Scheme will be closed, except for increments and options.

Transfer of assets and SCR Ratio

11. As well as a transfer of policies and associated liabilities, a Part VII transfer usually includes a transfer of assets. These assets reflect an agreed part of the fund with which the corresponding liabilities are associated. For non-profit and unit-linked businesses, it is a relatively straightforward process for the transferee and the transferor to agree which assets to transfer.
12. In this case the Scheme contains a provision requiring Aviva to transfer assets of a sufficient value to ensure that after the Scheme becomes effective, ALPI will have an SCR Ratio (i.e. the ratio of own funds to its Solvency Capital Requirement (“SCR”) under Solvency II) of 150%. This will include Aviva making an estimated capital injection of £136 million into ALPI.

Brexit reinsurance

13. For with-profits business, if, as is the case for the with-profits OLAB policies being transferred under the Scheme, only a proportion of a fund is being transferred, the process of identifying and transferring assets is not straightforward. It would need to take account of the transferring policyholders’ interest in the estate (the difference between the assets of the with-profits fund and its policyholder (and other) liabilities) and the value of any support arrangements, as well as the policy liabilities. Furthermore, the process would need to ensure that the split of the assets of the with-profits fund was fair to both the remaining policyholders and the transferring policyholders. The process to determine how to split the assets of a with-profits fund is complex. The evidence is that it may take more than 18 months to complete and certainly could not be achieved before Brexit.
14. To address these issues, the Scheme provides that all of the OLAB policies which are to be transferred will be immediately 100% reinsured back (on a quota share basis) into the funds of Aviva from which they were transferred (the “Brexit Reinsurance”). Any premiums that ALPI receives which relate to OLAB must be paid to Aviva and allocated to the funds in which that OLAB policy was invested prior to the transfer. Similarly, any claims payments relating to OLAB policies must be transferred from the Aviva fund in which the policy is reinsured to ALPI. This mechanism ensures that the funds of Aviva from which OLAB policies are transferred will continue to operate as they do now.
15. In essence, the Brexit Reinsurance is designed to ensure that the transferring OLAB policyholders can continue to enjoy precisely the same benefits that they enjoyed at Aviva. As such, the Brexit Reinsurance forms an important part of the Scheme for these transferring policyholders. The terms upon which the Brexit Reinsurance can be terminated are therefore also of critical significance.
16. There are limited circumstances in which the Brexit Reinsurance can be terminated voluntarily. Importantly, this process would require the prior approval of an independent actuary, consultation with the With Profits Committee of Aviva, and

notification to the Central Bank of Ireland and a period of 60 days being allowed for any objections.

17. If the Brexit Reinsurance is terminated, the apportionment of the relevant Aviva funds that the Brexit Reinsurance was designed to avoid will need to take place. If termination were to occur, the Scheme and the Brexit Reinsurance agreement set out a methodology for the split of the relevant Aviva funds and the payment of the appropriate termination amount due from Aviva to ALPI. That process envisages the payment of an estimated termination amount within three days of termination of the Brexit Reinsurance, the provision by Aviva to ALPI of any funds necessary to enable ALPI to meet payments due to OLAB policyholders in the period until the final termination amount is determined, and the determination (true-up) of the final termination amount as soon as reasonably practicable. I shall return briefly to consider one aspect of this procedure at the end of this judgment.

Security Arrangements

18. As a result of the Brexit Reinsurance, ALPI is exposed to the financial position of Aviva. Without further provision, ALPI would not be treated in the same way as Aviva's direct policyholders in the (unlikely) event of Aviva becoming insolvent. This is because ALPI would be an unsecured creditor of Aviva and would rank behind the direct policyholders of Aviva in an insolvency process. Unless addressed, this would, indirectly, produce a worse position for the transferring policyholders, who currently would rank equally with other direct policyholders of Aviva.
19. To mitigate this risk, ALPI will take a floating charge ("the Charge") over all the assets of Aviva, excluding any assets subject to fixed security or over which Aviva is prohibited from creating security. The Charge will contain an equalisation provision to ensure that in an insolvency the direct policyholders of Aviva and ALPI effectively rank *pari passu*.

Management and administration of OLAB

20. The Brexit Reinsurance also provides for the parties to sign a legally binding side-letter transferring responsibility for the management and administration of OLAB from ALPI to Aviva, with ALPI providing oversight. This is designed to ensure that the administration of the OLAB policies is unchanged. The side letter endures for as long as the Brexit Reinsurance is in force.

The Law and Practice

21. The law and practice in relation to Part VII transfer schemes designed to deal with the difficulties of Brexit has been considered in a number of recent cases, including, in particular, re AIG Europe Limited [2018] EWHC 2818 (Ch) "AIG"; The Prudential Assurance Company Limited [2018] EWHC 3811 (Ch) ("Prudential"); and The Royal London Mutual Insurance Society Limited [2019] EWHC 185 (Ch) ("Royal London"). For ease of reference, I shall set out those principles again in this judgment.

Part VII Transfers

22. Section 104 FSMA provides that no insurance business transfer scheme is to have effect unless an order sanctioning it has been made under section 111(1).
23. Sections 105(1) and 105(2)(a) FSMA provide in relevant part,
- “(1) A scheme is an insurance business transfer scheme if it-
- (a) satisfies one of the conditions set out in subsection (2);
- (b) results in the business transferred being carried on from an establishment of the transferee in an EEA State; and
- (c) is not an excluded scheme.
- (2) The conditions are that -
- (a) the whole or part of the business carried on in one or more member States by a UK authorised person who has permission to effect or carry out contracts of insurance (“the transferor concerned”) is to be transferred to another body (“the transferee”); ...”
24. Section 111(1) FSMA sets out the conditions which must be satisfied before the court may make an order sanctioning an insurance business transfer scheme. The conditions are that all of the appropriate certificates and authorisations to conduct the transferring business shall have been obtained from the relevant regulators (section 111(2)) and that the court considers that, in all the circumstances of the case, it is appropriate to sanction the scheme (section 111(3)).
25. Section 112 then provides for the making of orders to give effect to the transfer of the business, including as to the transfer of property, rights and liabilities (section 112(1)(a)), the continuation by and against the transferee of pending legal proceedings by and against the transferor (section 112(1)(c)), and such incidental, consequential and supplementary matters as are necessary to secure that the scheme is fully and effectively carried out (section 112(1)(d)).
26. The general approach to the exercise of the Court’s discretion under section 111(3) FSMA is now well established. It follows the approach adopted under the predecessor of Part VII FSMA, namely Schedule 2C to the Insurance Companies Act 1982. The principles were conveniently summarised by Evans-Lombe J in Re AXA Equity & Law Life Assurance Society plc and AXA Sun Life plc [2001] 1 All ER (Comm) 1010 (“AXA”) at pages 1011-1012 as follows,
- “(1) The 1982 Act confers an absolute discretion on the court whether or not to sanction a scheme but this is a discretion which must be exercised by giving due recognition

to the commercial judgment entrusted by the company's constitution to its directors.

(2) The court is concerned whether a policyholder, employee or other interested person or any group of them will be adversely affected by the scheme.

(3) This is primarily a matter of actuarial judgment involving a comparison of the security and reasonable expectations of policyholders without the scheme with what would be the result if the scheme were implemented. For the purpose of this comparison the 1982 Act assigns an important role to the independent actuary to whose report the court will give close attention.

(4) The FSA by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on whether policyholders are likely to be adversely affected. Again the court will pay close attention to any views expressed by the FSA.

(5) That individual policyholders or groups of policyholders may be adversely affected does not mean that the scheme has to be rejected by the court. The fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected.

(6) It is not the function of the court to produce what, in its view, is the best possible scheme. As between different schemes, all of which the court may deem fair, it is the company's directors' choice which to pursue.

(7) Under the same principle the details of the scheme are not a matter for the court provided that the scheme as a whole is found to be fair. Thus the court will not amend the scheme because it thinks that individual provisions could be improved upon.

(8) It seems to me to follow from the above and in particular paras (2), (3) and (5) that the court, in arriving at its conclusion, should first determine what the contractual rights and reasonable expectations of policyholders were before the scheme was promulgated and then compare those with the likely result on the rights and expectations of policyholders if the scheme is put into effect."

27. The role of the "independent actuary" referred to by Evans-Lombe J is now fulfilled under section 109 FSMA by a report from an "independent expert" (invariably an actuary) and the role of the FSA is now fulfilled by the Financial Conduct Authority ("FCA") and Prudential Regulation Authority ("PRA") together.

28. The approach of the Court to the report of the independent expert and the views of the Regulators was described by Briggs J in Re Pearl Assurance (Unit Linked Pensions) Limited [2006] EWHC 2291 (Ch) at paragraph 6,

“6. Notwithstanding that detailed perusal of a proposed Scheme both by an independent expert and by the [Regulators] are conditions precedent to the exercise of the court's discretion to sanction it, the discretion remains nonetheless one of real importance, not to be exercised in any sense by way of rubber stamp.... The relevant principles are concisely summarised in the following passage from the judgment of Mr. Justice Rimer in Re Hill Samuel Life Assurance Limited [1998] 3 All ER176, at177:

"Ultimately what the court is concerned with is whether the scheme is fair as between different classes of affected persons, and in arriving at a conclusion as to whether or not it is, amongst the most important material before the court is material which the Act requires to be before it, namely the report of an independent actuary as to his opinion on the scheme."

Part VII schemes and Brexit

29. In AIG, after referring to the approach in the London Life and AXA cases, I considered the effect of Brexit upon the discretionary decision of the Court in the context of an insurance business transfer scheme. I said, at [44]-[46],

“44. ... in considering whether the protections for policyholders are sufficient, it should be borne in mind that the current background is not the one that has often been considered in the past, where the independent expert, the Regulators and the Court are considering a transfer of insurance business which is being undertaken by the company concerned for entirely commercial reasons within its own control. The current situation is different.

45. The evidence of [the transferor] is that the uncertainty over the Brexit negotiations means that if it delayed further and did nothing, there is a real risk that substantial numbers of policyholders would be materially prejudiced in event of a “hard” [“no-deal”] Brexit by the loss of [the transferor’s] EU passporting rights, and a resultant inability of [the transferor] to continue to service policies through its overseas branches or even pay policyholders’ claims in other EU jurisdictions. The concerns expressed by [the transferor] seem genuine and reasonable, and in the absence of any objection or contrary evidence from the Regulators, I am not in a position to second-guess the directors of [the transferor] in this respect.

46. The consequence is that, in applying the tests in the authorities to which I have referred above, I must balance the risk of prejudice to a large body of policyholders in the EEA ... if the Scheme were not to be sanctioned, against any potential risk of prejudice to individual policyholders under the terms of the proposed Scheme. In that regard, as was made clear by Evans-Lombe J in the AXA case, the fundamental question is whether the proposed Scheme as a whole is fair as between the interests of the different classes of persons affected. The current uncertainty over Brexit means that there may be no perfect solution for the holders of the policies being transferred ..., and the possibility that some individual policyholders or groups of policyholders may be adversely affected in certain respects does not mean that the Scheme necessarily has to be rejected by the Court. It is also worth reiterating that it is not my function to produce what, in my view, is the best possible scheme: as between different schemes, all of which the Court might deem fair, it is the directors' choice which [the transferor] should pursue."

30. That approach was not challenged by the PRA in Royal London and Mr. Simpson told me that this remains its position. It is also consistent with the approach adopted in other cases involving banking business transfer schemes: see e.g. Barclays Bank plc [2019] EWHC 129 (Ch) and UBS Limited [2019] EWHC 216 (Ch).
31. For the purposes of the instant case, and for reasons that I will explain, Mr. Moore QC particularly emphasised the points that the current uncertainty over Brexit means that there may be no perfect solution; the possibility that some groups of policyholders may be adversely affected in certain respects does not mean that a scheme necessarily has to be rejected by the Court; and that provided that the proposed scheme is fair, it is not the function of the Court to produce what, in its view, is the best possible scheme.

The need for the Scheme

32. On 21 December 2017 the European Insurance and Occupational Pensions Authority ("EIOPA") issued an opinion on service continuity in insurance in light of the withdrawal of the UK from the EU. EIOPA's opinion was that, in the absence of a political agreement between the EU and the UK, UK insurance undertakings would lose their right to conduct business in the Member States of the EU by way of freedom of establishment and freedom to provide services under Solvency II. EIOPA stated that in such a situation, unless UK insurance companies took "mitigating actions" before Brexit, they would usually not be able to ensure the continuity of their services with regard to cross-border insurance contracts concluded prior to the date of the UK's withdrawal from the EU. One of the options suggested by EIOPA to ensure service continuity was the transfer of insurance contracts of UK undertakings with policyholders in the remaining 27 EU Member States to an insurance subsidiary established in an EU27 Member State.
33. Against the background of that opinion from EIOPA and the continuing uncertainty over the terms of Brexit during 2018, Aviva wrote to its relevant policyholders in

October 2018 explaining that it intended to propose the Scheme to provide certainty for its customers.

34. The PRA also addressed Brexit in its evidence. The PRA's second report stated,

“The PRA is conscious of the fact that the Scheme is driven by the UK's anticipated exit from the European Union, expected to be on 29 March 2019. In particular, the PRA notes that in the absence of a withdrawal agreement between the UK and the EU, UK firms' passporting rights to other EEA jurisdictions will end upon the UK's exit from the European Union. In the absence of such passporting rights, there is uncertainty as to whether UK firms can lawfully continue to carry on insurance business in such other EEA jurisdictions.

Having regard to such uncertainty, the PRA considers that it is reasonable for the Transferor to take steps to achieve certainty, including the carrying out of the Scheme. The PRA's view is that the Court is entitled to take account of such uncertainty when assessing the Scheme and whether policyholders are materially adversely affected by the Scheme.”

35. In common with its approach in other similar schemes, the FCA's report also stated,

“Whilst the FCA is unable to opine on the likely outcome of the UK-EU negotiations, and whilst it remains unclear as to what the impact of the UK's withdrawal from the EU will be, the FCA generally expects the Applicants and the Independent Expert to have properly and fully considered the potential implications and risks to policyholders associated with the UK's withdrawal, in the context of the proposed transfer. Where the analysis shows that there are risks that the policyholder position could be materially affected, the FCA expects the Applicants and the Independent Expert to have given proper and full consideration to possible mitigations and solutions to minimise any policyholder detriment arising from the Scheme.”

36. I shall return to consider the possible mitigations and solutions to minimise policyholder detriment arising from the Scheme when considering the views and objections of policyholders below.

The Independent Expert

37. The Independent Expert in this case is Mr Tim Roff, a partner at Grant Thornton LLP and a Fellow of the Institute and Faculty of Actuaries. He has over 30 years' experience in the life assurance sector. This includes acting as Independent Expert in a number of Part VII transfers, including in the Royal London case. His appointment as Independent Expert was approved by the PRA. The PRA has, as is normal, also approved the form of Mr. Roff's reports.

Mr. Roff's independence

38. A requirement to amend drafts of Mr. Roff's first report during this process led to a delay to the intended date of 1 January 2019 upon which Aviva wished to have the Scheme made effective. That in turn led to a dispute between Aviva and Grant Thornton over who should have responsibility for the extra costs incurred by Aviva resulting from the delay.
39. That dispute has now been resolved on terms that were explained in Mr. Roff's Supplementary Report as follows,

“Grant Thornton and Aviva have now resolved this issue. They have agreed that Aviva will pay Grant Thornton its fees for work to the Directions Hearing as estimated, plus its fees for work thereafter on a time-spent basis and Grant Thornton will make a substantial payment to Aviva and also discount its fees on any engagements that it may perform for Aviva for a period in the future.”

The financial details of the settlement were not included in the Supplementary Report and are confidential. I was, however, shown a copy of the terms of settlement on a confidential basis.

40. Given the importance of his role, it is of fundamental importance that the Independent Expert is not placed under any pressure, whether financial, time or otherwise, which might in any way compromise his independence or the proper performance of his functions. In the instant case, whatever may have been the reasons for the delay, and notwithstanding the urgency caused by the Brexit timetable, it is of vital importance that Mr. Roff should not have felt under any obligation or pressure whatever to cut corners or express a favourable opinion on the Scheme in order to reduce any demands for financial recompense by Aviva against Grant Thornton.
41. I have seen nothing to suggest that such pressure was placed on Mr. Roff, and in his Supplementary Report Mr. Roff stated that he had carefully considered whether the dispute had compromised his independence, and had concluded that it did not. Mr. Roff confirmed to me in person at the hearing that he did not wish to add anything to his reports. The PRA and FCA also indicated that, having been made aware of the settlement of the dispute, they did not have any concerns in this regard.
42. For my part, having had the opportunity to review Mr. Roff's reports in some detail and having been informed of the terms of settlement, I also have no reason to doubt Mr. Roff's assessment of his position. I am content that his views and opinions have been carefully and independently considered and given.

Mr. Roff's Opinion on the Scheme

43. Mr Roff's reports are very detailed and thorough. He has examined the effect of the Scheme on the security of benefits, benefit expectations, regulatory governance and

service standards of the three groups of policyholders concerned: those transferring to ALPI, those remaining with Aviva and those who have existing policies in ALPI.

44. I do not consider it necessary to summarise the reasoning in Mr Roff's reports in any detail in this judgment. I will simply say that I see no reason to doubt any of his conclusions, which are conveniently summarised in an executive summary as follows:

“2.32 In summary, it is my opinion that the implementation of the proposed Scheme, Brexit Reinsurance and the Charge at the Effective Time will not have a material adverse effect on the security of benefits or the future benefit expectations of any of the Transferring Policyholders, the Remaining Policyholders of Aviva, or the Existing Policyholders of ALPI.

2.33 It is also my opinion that the Transfer will have no material impact on the governance or service standards experienced by any of the Transferring Policyholders, the Remaining Policyholders of Aviva or the Existing Policyholders of ALPI.

2.34 I have taken into account the loss of Financial Services Compensation Scheme (“FSCS”) protection currently given to some of the Transferring Policyholders. FSCS is a statutory “fund of last resort” in the UK for private policyholders and small businesses (those with an annual turnover of less than £1,000,000) when an insurer is unable to meet fully its liabilities. It protects policyholders for the duration of their policy if a financial services company were to become insolvent. The loss of FSCS protection for these Transferring Policyholders is a result of them being transferred from the UK to another insurance entity in another EU country. However, following Brexit, it may become illegal for Aviva to continue to administer the Transferring Policies. In my view, the impact of the loss of FSCS protection is significantly less material than the need for certainty that the Aviva Group will be able to legally service the Transferring Policies post-Brexit. Additionally, the FSCS provides protection in an insolvency event, and in my opinion, given that Aviva and ALPI are well capitalised, the risk of insolvency for these entities is remote, and so the likelihood of any policyholders needing to call upon FSCS is equally remote.

2.35 The Brexit Reinsurance and the Charge form an important part of this transfer as they are being put in place to ensure that the Scheme does not result in any material adverse impact on policyholders. I have considered the Brexit Reinsurance and the Charge and it is my opinion that the reinsurance agreement allows the with-profits policies continued participation in the funds in which they currently reside and the unit-linked policies to have continued access to

the unit-linked funds they are currently able to access. The Charge aligns ALPI's interest with those of the direct policyholders of Aviva in relation to the distribution of the assets of Aviva in the event that Aviva becomes insolvent. Furthermore, in my opinion, the probability of either Aviva or ALPI becoming insolvent is remote.

2.36 In the event that the Brexit Reinsurance is terminated in the future, I am satisfied that the Scheme provides adequate protection to policyholders to ensure that they will be treated fairly.

2.37 Overall, I am satisfied that the Scheme is equitable to all classes and generations of policyholders of Aviva and ALPI.”

Policyholder communications

45. In excess of 515,000 policyholder packs were sent out in addition to the other publicity for the Scheme. By 27 January 2019, 13,660 communications had been received in response, but only 4,032 (roughly 29.5% of communications received from policyholders) related to the Scheme of which only 189 (roughly 1.4% of communications received) were categorised as voicing an objection. All but one of these were from transferring policyholders. By the end of the hearing, the number of communications which might be characterised as objections had risen to 216. I was provided with summaries of all those objections at the hearing, and both the Independent Expert and the Regulators had classified them into themes and reported their views to me on them.
46. In addition, one transferring policyholder, Mr Liam Doyle, appeared at the hearing and made a number of observations to me. I think it would be right to characterise Mr. Doyle's attitude as that of a concerned observer, rather than an outright objector to the Scheme. Of particular concern to him were the security of his policy, the regulatory regime in Ireland as opposed to that in the UK, the independence of Mr. Roff, and the justification for depriving some transferring policyholders of access to the FSCS. In the latter respect I should record that Mr. Moore QC subsequently told me at the hearing that Mr. Doyle's policy was of a type that would not qualify for FSCS protection in any event: but his concerns nonetheless reflected those voiced by a significant proportion of the other policyholders who responded.
47. I therefore now turn to address the main concerns and objections of policyholders.

Solvency and security

48. Some policyholders expressed concern over the security of their policies once transferred to ALPI. As indicated above, the Scheme provides for ALPI to have an SCR Ratio of 150% after the Scheme takes effect. That compares with Aviva which has an SCR Ratio prior to the Scheme of 154%. Existing policyholders of ALPI will also see a decrease in ALPI's own SCR Ratio from 159% to 150% as a result of the Scheme. Aviva's SCR Ratio will marginally increase after the Scheme takes effect.

49. The Solvency II regime requires insurers to maintain capital reserves so that they can survive extreme events that are expected to occur only once in every two hundred years. An SCR Ratio of 150% comfortably exceeds the minimum requirements of Solvency II. As such, both the marginal reduction in their insurer's SCR Ratio from 154% to 150% for transferring policyholders, or a reduction from 159% to 150% for existing policyholders of ALPI, represents a very small increase in the risk of insolvency indeed. Mr. Roff is of the opinion that such changes in SCR Ratio are not material for the relevant policyholders, and I accept that opinion.
50. Mr. Roff is also of the opinion that although the risk profile of ALPI's business is altered as a result of the Transferred Business, ALPI has the relevant experience of managing risks, and the change will not adversely affect its existing policyholders. Mr. Roff is also of the opinion that the counterparty risk to which ALPI is exposed by the Brexit Reinsurance is adequately mitigated by the Charge, which he has been advised by Gabriel Moss QC is untested in an insolvency event, but would work as intended. Again, I accept Mr. Roff's opinion.

Pre-empting the outcome of Brexit

51. A number of policyholders questioned why the Scheme is being proposed now, as opposed to waiting for the outcome of the Brexit negotiations.
52. Mr. Roff dealt with this point in his Supplementary Report,

“At the time of writing, the Brexit negotiations are still ongoing, and it is unclear whether, following Brexit, UK insurance firms will still be able to service policies sold under EU passporting rights legally. In particular, there have been no developments within the public domain that provide any certainty over whether Aviva will be allowed to continue to service business written under EU passporting rights after 29 March 2019. At this stage, even if there were proposals for UK insurers to continue servicing policies sold under EU passporting rights, these would not have been progressed fully into law and so there would still be uncertainty about the final outcome of Brexit. It is still possible that a transition period will be agreed, allowing Aviva to continue to service policies sold under EU passporting rights for a limited period after 29 March 2019. However, it is unclear how long any transition period may be. ...

....

Hence, in order to avoid a situation where Aviva is not able to service policies sold under EU passporting rights legally, Aviva has proposed to transfer such policies to an entity where the servicing of these policyholders will be continued in the same manner as currently, regardless of the outcome of the Brexit negotiations. ... I am satisfied that this is a reasonable approach.”

53. The PRA and FCA also referred, without disagreement, to these views, and as I have indicated above, the PRA's own view was that having regard to the continuing uncertainty as to whether UK firms will be lawfully able to carry on insurance business in other EEA jurisdictions after Brexit,

“the PRA considers that it is reasonable for the Transferor to take steps to achieve certainty, including the carrying out of the Scheme.”

54. For Aviva, Mr. Moore QC submitted that Aviva had been forced to deal with the current position in law, which is that the UK will leave the EU on 29 March 2019 with or without a deal, rather than speculate on the outcome of the Brexit negotiations. He stated that Aviva was now committed to the Scheme, and that

“the current state of extreme and intensifying uncertainty regarding the terms of the United Kingdom's departure from the European Union renders the need for certainty of provision all the more pressing.”

55. I accept that evidence and those submissions. In my judgment, Aviva is acting reasonably in promoting this Scheme to achieve certainty for its policyholders whatever the outcome of the Brexit process.

56. I would add, as the PRA submitted in Royal London, that in the event of a no-deal Brexit, there would be further uncertainty as to whether any Part VII transfer scheme taking place after the UK leaves the EU would be recognised in any EEA jurisdictions. It is therefore necessary for such a scheme to be promoted before the UK leaves the EU.

FSCS Protection

57. A large proportion of the objections received related to the loss by some of the transferring policyholders of the protection of the UK's Financial Services Compensation Scheme (“FSCS”) as a result of the Scheme. The FSCS is a ‘fund of last resort’ in the UK for private policyholders and small businesses when an insurer is unable to fully meet its liabilities. If Aviva were to become insolvent and was unable to pay claims in full to its policyholders, the FSCS would provide compensation for financial loss to protect 100% of the long-term insurance benefit.

58. As a result of the Scheme, all with-profits and non-profits Irish Business sold through the Irish Branch of Aviva after the Irish Scheme was put in place and all the OLAB Business will lose FSCS protection. The other policies being transferred, the with-profits and non-profits business originally transferred to Aviva as part of the Irish Scheme, do not currently have FSCS protection and so will be unaffected.

59. The loss of FSCS protection is a common feature of Part VII transfer schemes of this nature given that few, if any, other EEA states have policyholder protection schemes of a comparable nature to the FSCS. This point has therefore been considered in most of the other Brexit cases. For the same reasons that I gave in Royal London, in

this case it appears to me that the loss of protection is most unlikely to lead to any material prejudice to policyholders in practice.

60. Mr. Roff explains at length in his reports that the prospect of ALPI becoming insolvent, and therefore the need for protection arising, is remote. Mr. Roff is of the opinion, which I accept, that the possibility that some transferring policyholders might lose FSCS protection in that remote situation is more than outweighed by the far greater risk of real and immediate prejudice to such transferring policyholders if the Scheme were not to be implemented and there were to be a ‘no-deal’ Brexit. In such a case, those policies could not be serviced, which might include claims not being paid.
61. The PRA is satisfied with Mr. Roff’s assessment of this issue and has pointed out that there is no more suitable alternative jurisdiction in the EEA to which the policies might be transferred that would offer any equivalent protection to the FSCS.
62. In this situation there is, as I observed above, no perfect solution to a problem which has been forced upon Aviva rather than being one of its own making. In such a situation, the fact that some policyholders may suffer some remote risk of prejudice from loss of FSCS protection does not, in my judgment, mean that the Scheme, as a whole, is not fair as between the various groups of policyholders.

Changing insurers and regulators

63. A small number of the objections received related to the fact that the policies are moving from Aviva, a UK company, to ALPI, an Irish company. These objections raised concerns both that the taxation, legal and regulatory regime in Ireland would have a negative impact on transferring policies, and that ALPI may have lower operational standards than Aviva in areas such as governance, customer services, solvency levels and security.
64. The evidence of Mr. Roff is that transferring policyholders will not suffer any adverse impact on either of these bases. On the first, whilst there are some differences between the legal systems in Ireland and the UK, they are similar in many respects and, notably, both follow the Solvency II regulations. Mr. Roff also states that the tax implications of the Scheme will be broadly neutral to policyholders, save for a change in the taxation on investment returns for non-profit Irish policyholders (which is both unavoidable and not material). On the second, both ALPI and Aviva are part of the wider Aviva group and have and will continue to have similar operational standards.
65. Overall, I accept Mr. Roff’s opinion that the Scheme is unlikely to cause any significant changes in these respects that would have any material adverse impact on the transferring policyholders.

Policy performance

66. There have been a small number of objections raising concerns that the performance of transferring policies will be negatively affected by the Scheme. However, as Mr. Roff explains, the funds which the unit-linked and with-profits transferring policies are invested in will not, in effect, be altered by the Scheme. The relevant assets will

either be transferred to ALPI or will in effect remain accessible via the Brexit Reinsurance as I have described. Moreover, the investment managers of the funds will not change.

67. Mr. Roff's opinion is therefore that the operation, management and performance of the transferring policies and funds will not be affected by the Scheme. I accept Mr. Roff's opinion on these points.

Swedish and Icelandic policyholders

68. As indicated above, one feature of the Scheme is that only certain policies held by persons resident in Sweden and Iceland are to be transferred to ALPI. There are, in total, about 9,000 policies in Sweden and 10,000 policies in Iceland that are excluded from the Scheme (so-called "out-of-scope" policies).
69. Aviva's evidence explained how the boundaries of the Scheme had to be defined at an early stage of the process, and how the decision came to be made to exclude these out-of-scope policies,

"These are heritage Friends Provident policies that were targeted for sale to the UK market, are subject to UK law and regulations and may be subject to UK tax, but which were purchased by policyholders habitually resident in Iceland or Sweden rather than policyholders habitually resident in the UK. At an early stage of the planning process for the Scheme it was decided that these policies would not be Transferred Policies and would not be transferred pursuant to the Scheme. In particular, it was thought that there could be adverse financial consequences for these policyholders if these policies were transferred out of the UK, as these policies may have been taken out specifically because they are subject to UK regulations. In addition, since these policies do not form discrete books of business (but rather are parts of a number of larger UK books), it would be operationally challenging to ring-fence these specific policies within each product group identified in order to administer and manage these policies separately post-transfer."

70. Although the policies in question may have been "targeted for sale to the UK market", it would be wrong to suppose that the purchase of these policies by 19,000 customers in Iceland and Sweden was a random or abnormal occurrence. Rather, it appears that they were sold to policyholders through Aviva's brokers in those countries at the relevant times.
71. The evidence filed for the hearing did not make clear precisely what (unspecified) "adverse financial consequences" Aviva thought would be caused to such policyholders by the transfer of their policies to ALPI, or which particular "UK regulations" might be thought to have attracted the policyholders and might justify not transferring the relevant policies. Nor was it clear what (unspecified) "operational challenges" Aviva might encounter in separating out these policies.

72. Evidence filed after the hearing has, however, provided some clarification of both points. Aviva believes that some of the out-of-scope Swedish policies may have been thought attractive because they are subject to Guernsey tax; and the out-of-scope policies for both countries are spread across a very large number of UK product types. This would necessitate considerable work if they were required to be identified and separated, together with their associated assets, from the remainder of the UK books of business and relevant funds.
73. The FCA picked up the exclusion of these policies from the Scheme in its report to the Court prior to the Directions Hearing on 16 October 2018. The FCA commented,

“...Our current understanding from the Transferor is that the exclusion from the transfer of the policies held by Icelandic and Swedish policyholders is not something they consider will cause detriment to the affected policyholders as the Transferor’s intention is to pay out on their contractual obligations to these policyholders.

There is a question as to whether there could be regulatory consequences in Iceland and Sweden as a result of continuing to pay out the contractual obligations. The FCA understands that the Transferor intends to continue its analysis of the regulatory position for the Icelandic and Swedish policyholders, particularly as the terms and arrangements for Brexit become clearer. The FCA intends to continue its discussions with the Transferor in relation to such analysis, given its interest in seeing that firms are taking appropriate steps to ensure an appropriate degree of protection and of information for their customers, UK or otherwise.”

74. I have some difficulty with the view attributed to Aviva by the FCA that exclusion of these policies from the Scheme would not cause detriment to the affected policyholders. I take as read that, all other things being equal, Aviva would intend to honour its contractual commitments to the excluded policyholders. But exclusion from the Scheme carries the risk that Aviva will not be able to honour its contractual commitments to such policyholders, because Aviva may not be able to provide continuity of service to them after Brexit. That potential prejudice is, as I have explained, the primary driver for the Scheme as regards all other EEA policyholders (including other policyholders in Sweden and Iceland) who are being transferred.
75. However, as the FCA report indicated, Aviva has, since the Directions Hearing, taken steps to seek to protect the interests of the out-of-scope Icelandic and Swedish policyholders. In particular, Aviva contacted the relevant regulators in Iceland and Sweden to enquire whether it could continue to act as insurer in respect of these “out of scope” policies after Brexit.
76. On 21 January 2019, the Icelandic Financial Services Authority (the “IFSA”) advised Aviva that it could continue to service the out-of-scope Icelandic policies until they expire. The IFSA also notified Aviva that it would be required to obtain

an authorisation in Iceland should it intend to carry out any additional services or marketing activities in Iceland.

77. The application to the Swedish regulator was by way of a request dated 11 January 2019 for a formal ruling on the point under the relevant Swedish Act on Foreign Insurers. The request indicated that Aviva intended to service the relevant policies using an insurance intermediary based in the UK and had no insurance intermediary in Sweden. By the date of the hearing before me, however, Aviva had not received any response from the Swedish regulator and I was informed that a response could only be expected about 60 days from the date of the request (i.e. next month).
78. I was also told in submissions that Aviva had made alternative proposals to the FCA involving the setting up of a third country branch in Iceland or Sweden, or appointing a local agent in those countries, in the event that satisfactory assurances were not received from the relevant regulators.
79. Mr. Moore QC submitted that irrespective of the uncertainties surrounding the out-of-scope Icelandic and Swedish policyholders, I should nevertheless sanction the Scheme. Mr. Moore put forward a series of propositions in support of that submission.
80. The first submission was simply that it was up to Aviva to select who it intended to transfer and who it did not, and that provided that such selection was not made capriciously, the Court could not intervene. On behalf of the FCA, Mr. Simpson supported Mr. Moore and went further. He submitted that the Court's role was confined to considering how Aviva's policyholders were affected by the Scheme. He contended that the Scheme did not affect the out-of-scope Icelandic and Swedish policyholders in any different way from the other UK policyholders who were not included. Mr. Simpson submitted that the prejudice to the out-of-scope Icelandic and Swedish policyholders caused by a loss of service would be the result of a no-deal Brexit and not the consequence of anything in the Scheme, and hence I could not factor it into my decision whether or not to sanction the Scheme.
81. I do not accept that my discretion whether to sanction the Scheme is limited in the way that these submissions would suggest. As was made clear by Evans-Lombe J in AXA,

“The fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected.”

In that regard, it is entirely conventional for the Court to have regard to the effect of a scheme both on transferring (in-scope) and non-transferring (out-of-scope) policyholders. In doing that, the Court will compare the rights and expectations of all such policyholders before and after the proposed scheme.

82. I do not think that in determining what is fair or unfair as between policyholders in this way, the Court is obliged to disregard extraneous circumstances which would affect the ability of the transferor company to continue to deliver, and the ability of policyholders to continue to enjoy, the contractual rights and expectations in relation to their policies. Although it is likely to be a rare case and will turn upon the facts, I

consider that a decision by an insurer to promulgate a scheme to protect some policyholders against a risk that the insurer will not be able to continue to meet its commitments to them, but to leave other policyholders exposed to such risk, could, at least in principle, be unfair as between those two groups. I also do not regard it as helpful to superimpose upon the well-established test of fairness as between policyholders, a different test based upon a notion of whether it is “capricious” for the company to have excluded some policyholders from the scheme.

83. Secondly, Mr. Moore QC submitted that that the current uncertainty over Brexit means that there may be no perfect solution for every policyholder, and that prejudice to some policyholders might be unavoidable.

84. Mr. Moore QC referred to Evans-Lombe J’s comment in AXA that the possibility that a group of policyholders might suffer some adverse effect as a result of a Part VII scheme does not, of itself, necessarily mean that the Court must refuse its sanction. Evans-Lombe J’s comment should not be taken out of context: it was doubtless aimed at the ordinary case of a commercial scheme in which some policyholders suffer an element of unavoidable prejudice, but overall the scheme promotes a greater interest which is common to all policyholders.

85. In the context of Brexit, Norris J expressed a similar view in his recent judgment in UBS Limited [2019] EWHC 261 at paragraph 12, remarking that the Court should,

“...remember that some adverse effects might be mitigated or might be inevitable or inconsequential or a necessary price to pay to achieve some greater objective, so that adverse effects are not of themselves a bar to approval.”

86. I approach this point by reminding myself that this is not a Scheme designed to achieve a commercial advantage for Aviva: it is not a scheme that Aviva would have promoted were it not for the uncertainties caused by Brexit. It is also not a scheme under which some policyholders are being prejudiced in order to provide benefits to other policyholders: the potential prejudice to policyholders arises from an external source. Some latitude is therefore required.

87. In that regard, I am satisfied by the further evidence that the practical difficulties which would be caused to Aviva by having to separate out the out-of-scope Icelandic and Swedish policies are real and significant. Some mitigation of the position of the out-of-scope Icelandic policyholders appears to have been obtained, and although the position in Sweden is uncertain, Aviva offered an undertaking to the Court which reflected its proposals to the FCA to continue its efforts to find a solution for all such policyholders, namely,

“...to take such reasonable steps as are practicable and necessary (a) to continue to meet its obligations under the Relevant Policies, and/or (b) to put in place arrangements with the purpose of achieving an equivalent economic effect for the beneficiaries of the Relevant Policies (either itself or in conjunction with a third party), where “Relevant Policies” means those policies issued by the Transferor where (i) the habitual residence of the policyholder at the time of inception

of the policy was Iceland or Sweden, and (ii) the policy is not a Transferred Policy”

That undertaking was acceptable to the Regulators, and I am also satisfied that it should lead to sufficient mitigation of the adverse effects for such policyholders of not being included in the Scheme.

88. Finally, and in any event, Mr. Moore QC contended that on the exceptional facts of this case, it would not be rational for the Court to refuse to sanction the Scheme which provides essential benefits for the very large number of policyholders who are to be transferred, simply out of concern for the position of a small minority of out-of-scope Icelandic and Swedish policyholders.
89. I accept that submission. It would make no sense to refuse to allow Aviva to mitigate the potentially adverse effects of Brexit on the majority of EEA policyholders in a reasonable and efficient way, because of a difficulty in dealing with a relatively small minority of other EEA policyholders. My decision in this respect is, however, made far easier by the efforts made by Aviva to mitigate the adverse effects upon the out-of-scope Icelandic and Swedish policyholders to which I have referred above.
90. The final point that arises in relation to Icelandic policyholders is whether it is necessary for any Icelandic policies to be transferred under the Scheme at all. Might the apparently pragmatic approach of the Icelandic regulator to Aviva servicing the out-of-scope policies post-Brexit extend to the servicing of the in-scope Icelandic policies? If the in-scope Icelandic policies could lawfully be serviced by Aviva after Brexit, that would remove the very *raison d’etre* of the Scheme for such policyholders, and there is no immediately obvious reason why they should be transferred to ALPI and thereupon lose their FSCS protection.
91. This issue was the subject of substantial further evidence from Aviva after the hearing, explaining that the position of the Icelandic regulator as regards the in-scope policies is unknown, that a settled and clear position may not be reached prior to Brexit, and that there are good reasons to suppose that the Icelandic regulator might take a different stance in relation to in-scope policies, since they were designed and sold much more closely as Icelandic domestic products.
92. The evidence was also that whereas the Scheme provides a certain and permanent solution to the potential risk of Aviva being unable to service the in-scope policies after Brexit, there is no certainty that the Icelandic regulator’s position, even if currently favourable, might not change after Brexit, by which time it might be too late to do anything about it by a similar scheme.
93. The evidence also made much of the impracticality of seeking to “unravel” parts of the Scheme at this very late stage, and of the confusion that such a course might cause among Icelandic policyholders.
94. I accept these points. It is one thing relying (in part) upon an opinion of the Icelandic regulator as a mitigation of the practical problems of having to leave some Icelandic policyholders out of the Scheme. It would be quite another to rely upon such a reason to deprive those Icelandic policyholders who can definitely be included in the

Scheme of the substantial benefit of certainty of service continuity that the Scheme provides. In short, given the current uncertainties and the proximity of 29 March 2019, it is essential that the Court should be pragmatic and promote certainty.

Termination of the Brexit Reinsurance

95. I have summarised in paragraph 17 above the process that the Scheme requires to be followed for the split of the relevant Aviva funds and the calculation and payment of the termination amount in the event of termination of the Brexit Reinsurance. Although that process involves various independent parties, it does not require notification to be given to affected policyholders or provide any mechanism by which they might be involved.
96. That point was picked up in the Independent Expert's Report as follows,
- “The determination of the Termination Amount under the Brexit Reinsurance contrasts with a Scheme of Arrangement (a Court-approved agreement between a company and its shareholders or creditors) that might be initiated if the with-profits funds were to be partitioned before the Transfer. A Scheme of Arrangement usually requires Court approval. However, both processes require the involvement of the Regulators, the Aviva With-Profits Committee and the consent of an independent actuary which in my view gives sufficient protection to policyholders.”
97. I agree that the process involving the Regulators, the Aviva With-Profits Committee and the consent of an independent actuary is likely to give sufficient protection to policyholders in most situations. However, because policyholders are otherwise being denied the opportunity that they would have to challenge the process in Court were the fund split to be done in the conventional way, I do think that there ought at very least be some means for policyholders to enforce the mechanism in the unlikely event that it breaks down or is not followed in a timely fashion. That was the case, for example, in the Royal London scheme: see [2019] EWHC 185 (Ch) at paragraph 19.
98. When I put that to Mr. Moore QC, he submitted that it was implicit in fact that the Scheme (which scheduled the Brexit Reinsurance agreement and required it to be entered into) would have been sanctioned and given effect by an order of the Court, that a policyholder could apply to enforce the relevant mechanism by way of proceedings for contempt. Even were that correct, taking proceedings for contempt against Aviva would be a cumbersome and inappropriate process which would be unlikely to commend itself to policyholders. In my view, it would be more appropriate either to include a provision in the Scheme or in an undertaking to the Court, simply giving policyholders a right to apply to the Court to enforce the relevant mechanisms in the Scheme and the Brexit Reinsurance.
99. When I suggested this course to Mr. Moore QC, he indicated that Aviva was willing to offer a suitable undertaking. Appropriate wording was subsequently drafted by Aviva and approved by the Regulators. I am also satisfied with it.

Procedural requirements

100. All the necessary formalities required by FSMA and the relevant regulations have been complied with. In particular I have received the appropriate certificates from the PRA as to the consultation with, and consents from the relevant foreign regulators.

Conclusion

101. The statutory requirements having been satisfied, for the reasons that I have outlined above, I conclude that this is a Scheme that I should exercise my discretion to sanction. I shall therefore do so on the basis of the undertakings to which I have referred.