



Neutral Citation Number: [2021] EWHC 1813 (Ch)

Case No: CR-2020-004078

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

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

Date: 1 July 2021

Before:

MR JUSTICE SNOWDEN

IN THE MATTER OF SANTANDER UK PLC

**AND IN THE MATTER OF PART VII OF THE FINANCIAL SERVICES AND
MARKETS ACT 2000**

Martin Moore QC and Stephen Horan (instructed by Slaughter and May)
for Santander UK plc

Hearing date: 23 June 2021
Further written submissions: 25 June 2021

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.30 a.m. on Thursday 1 July 2021.

.....

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

Introduction

1. This is the hearing of a Part 8 claim brought by Santander UK plc (“SanUK”) under Part VII of the Financial Services and Markets Act 2000 (“FSMA”) for the sanction of a banking business transfer scheme (the “Scheme”). Under the Scheme, certain corporate and investment banking business of SanUK will be transferred to the London Branch (the “SLB”) of SanUK’s ultimate parent company, Banco Santander, S.A. (“Banco”). The hearing before me took place on 23 June 2021 and I received further written submissions on 25 June 2021.
2. SanUK is an English public company. It is authorised by the Prudential Regulation Authority (the “PRA”) and regulated by the PRA and the Financial Conduct Authority (the “FCA”) (the “Regulators”).
3. The London branch of Banco, the SLB, is not a separate legal person from Banco. However, for banking regulatory purposes it is treated as a distinct firm. Before the United Kingdom’s exit from the European Union, the SLB was authorised in the UK through the exercise of freedom of establishment rights and prudential supervision of credit institutions and markets on financial institutions under two EU directives, namely, CRD IV and MiFID II. Since the end of the Brexit transition period on 31 December 2020, the SLB is deemed to be authorised in the UK for the purposes of FSMA by the PRA pursuant to the UK’s temporary permissions regime (the “TPR”) and is subject to regulation by the PRA and the FCA. The SLB can operate under the TPR for up to three years whilst Banco is seeking permanent authorisation by the PRA as a third country firm. I was told by Mr. Moore QC that Banco has applied for authorisation for the SLB and expects to receive an answer later this year.

The reason for the Scheme

4. Santander was one of five large banking groups in the UK which were required to undertake ring-fencing transfer schemes pursuant to s.106B FSMA in 2018, separating their retail banking businesses from their wholesale and investment banking businesses in order to comply with the UK’s new ring-fencing requirements. The ring-fencing transfer scheme promulgated by Santander was sanctioned by Hildyard J, whose reasons were set out in a judgment dated 25 January 2019: see Re Santander UK plc [2019] EWHC 111 (Ch).
5. The result of the ring-fencing was that substantially all of the Santander Corporate and Investment Banking (“SCIB”) business in the UK (“SCIB UK”) was split between SanUK (as the ring-fenced bank) and the SLB (i.e. Banco). In addition to its retail banking business, SanUK retained most of the corporate banking business, and the investment banking and other business that was not permitted to be carried on by a ring-fenced bank was transferred to the SLB.
6. SanUK’s business thus includes a division that offers general banking services, including deposit taking services, to large corporates (who typically have annual turnover in excess of €500 million), financial institutions and financial sponsors. Customers of SCIB UK which transact with SanUK can therefore fairly be characterised as sophisticated.

7. The evidence is to the effect that SanUK and Banco, having reviewed the operation of the SCIB UK business, have decided that it would be better for substantially all of the SCIB UK business to be conducted from the SLB. The intention is that this will result in a simplified structure for the conduct of SCIB UK business.

The Transferring Business and the Excluded Business

8. The business transferring under the Scheme (the “Transferring Business”) comprises certain assets and liabilities of SanUK, and is primarily defined by reference to a specific list of transferring customers of SanUK (the “Transferring Customers”). Those customers are identified upon a flash drive which will be held to the order of the Court by SanUK’s solicitors. The Transferring Business comprises substantially all of the SCIB UK business conducted by SanUK and, in particular, includes all of the assets and liabilities associated with the Transferring Customers’ products, transactions or arrangements with SanUK, with some exceptions which are irrelevant for present purposes.
9. As at 9 June 2021, there are expected to be 594 Transferring Customers, representing (as at 30 April 2021) approximately £2 billion of assets and £3 billion of liabilities. Under the terms of a banking business transfer scheme agreement dated 16 September 2020 (as amended and supplemented) between SanUK and Banco (the “Transfer Agreement”), a balancing sum will also be transferred by SanUK to Banco representing the difference between the transferring assets and liabilities (being, as at 30 April 2021, about £1 billion).
10. The Transferring Business broadly falls into the following business groupings:
- i) the Global Transaction Banking business, which includes deposit-taking, cash management and documentary trade finance;
 - ii) the Global Debt Finance business, which includes loans and project finance;
 - iii) the Risk Solutions Group business, which includes vanilla interest rate and FX derivatives and structured deposits; and
 - iv) other Transferring Business, which is comprised of a small number of specified assets and liabilities which do not fall within limbs (i) to (iii) above.
11. Some SCIB UK business conducted by SanUK will not transfer under the Scheme because: (i) it will not transfer at all and is to remain in SanUK or has been or will be wound down in SanUK; (ii) it will be transferred outside the Scheme, either by novation, assignment or other form of transfer to the SLB or other entities or branches within the Santander group, or (iii) it will be terminated by SanUK and offered by the SLB to existing SCIB UK customers. The Scheme defines such business as “Excluded Business”.
12. Among the Excluded Business falling within limb (i), which will not transfer at all, are:
- i) SanUK retaining the role of security agent and security trustee in respect of the Global Debt Finance Business transferred from SanUK to the SLB until the maturity of the relevant transactions;

- ii) services provided by SanUK to SCIB UK customers through the Post Office Limited or Takepayments Limited, enabling the collection of bill payments;
 - iii) the SanUK cash handling business provided to SCIB UK customers;
 - iv) a limited number of specific arrangements to deal with particular circumstances unique to one or a small number of Transferring Customers; and
 - v) certain intra-group agreements, including the Transfer Agreement.
13. Among the Excluded Business falling within limbs (ii) and (iii), which will be transferred outside the Scheme are:
- i) transferring business governed by non-UK law. Subject to advice as to the likelihood that the Scheme, if sanctioned, will be recognised in the relevant jurisdiction, such business will be transferred outside the Scheme by various means (e.g. novation, transfer certificate, or cancellation and reissuance). The conventional trust arrangements in Part VII schemes will apply to any of this non-UK law business which has not transferred outside the Scheme by the final date provided by the Scheme for transfers to take place. In other words, such business will be held on trust by SanUK for the benefit of the SLB until the transfer of legal title can be effected. There are seven arrangements which fall within this category which, as at 12 March 2021, governed arrangements comprising approximately 0.5 per cent. of the total arrangements to be transferred under the Scheme;
 - ii) UK M&A corporate finance advisory business, which sits within SCIB UK, was transferred by way of novation from SanUK to the SLB on 1 January 2020;
 - iii) an electronic platform for the provision of supply chain finance facilities to Transferring Customers and/or uncommitted discount facilities for the suppliers of those Transferring Customers has been in the process of being wound down since June 2020, with any new business transacted through the SLB or Banco using the Banco group's electronic platform;
 - iv) complex cash management products, transactions and arrangements specific to certain Transferring Customers may be transferred outside the Scheme due to the complexity involved in transferring the business;
 - v) about 280 SanUK employees are expected to transfer to the SLB as a result of the Scheme, predominantly by operation of law pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

The benefits of the Scheme

14. The evidence asserted (but did not give any detail) that the Scheme will be for the benefit of Transferring Customers. In argument, Mr. Moore QC gave as an example a SCIB UK corporate customer who currently would deal with SanUK in respect of permitted business which the customer conducted in the UK, but would have to deal with the SLB or Banco in relation to prohibited business in the UK (that SanUK as a ring-fenced bank cannot conduct), or business that the customer conducted in the EEA (because SanUK has no authorisation to conduct business in the EEA). Mr. Moore QC

suggested that, for such customers, simplification from a dual structure to a single banking relationship would be a material benefit.

15. Mr. Moore QC accepted, however, that this might not be the case for every Transferring Customer of SanUK who would find that their relationship was being transferred from a UK ring-fenced bank to a non-ring-fenced branch of a Spanish bank, albeit one that is temporarily authorised to conduct business in the UK and which is regulated by the PRA and FCA. I shall return later in the judgment to how SanUK and the SLB have sought to identify and mitigate any potential adverse impacts of the Scheme upon such Transferring Customers.

Terms of the Scheme

16. As might be expected, the terms of the Scheme are detailed and complex. On an application such as this, with limited time and information as to the granular detail of the underlying banking transactions to which they relate, it is not realistic to expect the Court to scrutinise the detailed drafting of the Scheme, nor to form an independent view of its mechanics. I have not attempted to do so. Instead, I note that the Scheme has been developed and drafted by a leading international law firm, and in the absence of my attention being drawn by Mr. Moore QC to any particular clauses in respect of which there is any legal uncertainty, I am prepared simply to assume that the Scheme does what it is intended to do.
17. I am reinforced in the view that this is the correct approach to take by two further points which are designed to ensure that any errors in the operation of the Scheme can be corrected.
18. The first is that the Scheme contains a “wrong pockets” clause, which provides for corrective steps to be taken if SanUK or the SLB becomes aware, following the Scheme, that SanUK holds Transferring Business, or that the SLB has been transferred Excluded Business, and requires the parties to take such remedial steps as soon as reasonably practicable and no later than 1 April 2022.
19. Secondly, the Scheme also contains a provision under which minor or technical amendments to the terms, or amendments to correct a manifest error, can be made on notice to the Regulators and without recourse to the Court. It also provides for any more significant modifications to be made with the consent of the Court, and for the FCA, the PRA, or any person alleging that they would be adversely affected by the carrying out of the Scheme, to have the right to be heard on any application for such consent.

The Scheme timetable

20. There are three transfer dates proposed under the Scheme: 26 July 2021, 13 September 2021 and 11 October 2021 (the “Relevant Effective Dates”). There is also a final transfer date of 6 December 2021 (the “Contingency Transfer Date”) if a transfer does not occur on a Relevant Effective Date.
21. The rationale for choosing three Relevant Effective Dates was to minimise execution risk if the transfer of the whole business were to occur on a single date. The dates were selected to minimise disruption for Transferring Customers. As far as possible, they are

intended to avoid the changes in the bank, payments industry and banking market; to take into account peak holiday periods for customers and employees; and to take into account bank holidays, month-ends and other busy periods.

Communications and notifications

22. The notification requirements applicable to business transfer schemes are set out in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625) (the “Regulations”): see, in particular, paras 5 and 6.
23. In short, the Regulations require that a notice stating that the application for an order sanctioning the Scheme has been made is published in the official gazettes and in two national newspapers in the United Kingdom in the form approved by the PRA. The notice must contain the address from which the statement setting out the terms of the Scheme could be obtained. A copy of the statement summarising the Scheme must be given free of charge to anyone who requests it, and copies of the application and statement must be given free of charge to the FCA and the PRA at least 21 days before the sanction hearing.
24. I am satisfied on the evidence before me that these minimum notification requirements have been met. In particular:
 - i) the notice in the London, Edinburgh and Belfast Gazettes and the Financial Times and the Times in the form approved by the PRA appeared in the Gazettes and the two newspapers on 16 April 2021;
 - ii) a copy of the summary of the Scheme was available for free to anyone who requested it; and
 - iii) copies of the claim form and summary of the Scheme were provided to the PRA and FCA on 24 May 2021.
25. In fact, and as is typical, SanUK’s approach to communications went well beyond the minimum required by the Regulations, and Mr Dayal’s evidence set out that approach in considerable detail.
26. In broad summary, most Transferring Customer groups were first provided with customer information packs between January 2021 and March 2021; Transferring Customers have been encouraged to engage with their relationship managers or, where applicable, have been assigned a “Migration Implementation Manager” to assist with the migration to the SLB. Formal notification of the Scheme was sent to approximately 650 Transferring Customers on 16 April 2021, together with bilateral communications with other stakeholders (including third-party suppliers, agents, trustees or beneficiaries under bilateral or syndicated loan or credit structures and trade finance instruments, ratings agencies, HMRC and the Treasury). Moreover, SanUK has maintained a dedicated Scheme microsite on its website setting out relevant information and hosting relevant documentation.
27. Between 14 April 2021 and 18 June 2021, 46 communications were received from customers and other stakeholders relating to the Scheme covering a variety of topics. I

shall return to consider a number of those communications below, but suffice to say for present purposes, that most of them were in the form of questions and, importantly, none of them expressed any objection to the Scheme or its terms. In addition, no dissenting parties appeared at the sanction hearing to oppose the Scheme.

28. If the Scheme is sanctioned, the parties intend to send a confirmation email to each Transferring Customer explaining that the Scheme has been sanctioned, notifying (or reminding) the customer of their relevant transfer date, and setting out any steps that they are required to take.

Liaison with the Regulators

29. The evidence is that the parties have liaised extensively with the appropriate regulators in connection with the Scheme.
30. In the case of SanUK and the SLB, this has involved ongoing engagement with both the PRA and the FCA, including sharing the draft application and Scheme documents, and informing them of responses received from customers and other stakeholders. As indicated below, the PRA has provided a certificate of adequate financial resources for the Transferee in the form required by s.111(2)(a) and para 8, Sch. 12 FSMA. The Regulators did not exercise their right to be heard at the sanction hearing under section 110 FSMA.
31. In the case of Banco, the process of engagement has involved communication with the Joint Supervisory Team of the European Central Bank and the Bank of Spain (the “JST”), as well as the Spanish Ministry of Economic Affairs and Digital Transformation (the “MoEA”). Authorisation for the proposed transfer was granted by the MoEA on 3 March 2021.

Jurisdiction to sanction the Scheme

32. The jurisdictional conditions for a banking business transfer scheme are set out in section 106 FSMA, which provides that section 106 is satisfied if the conditions in section 106(1) are satisfied. These are:

“(a) that one of the two conditions set out in s.106(2) is satisfied;

(b) that the whole or part of the business to be transferred includes the accepting of deposits; and

(c) it is not an excluded scheme or a ring-fencing transfer scheme.”

33. The two alternative conditions in section 106(2) are:

“(a) that the whole or part of any business carried on by a UK authorised person who has permission to accept deposits is to be transferred to another person; or

(b) that the whole or part of the business carried on in the UK by an authorised person, who is not a UK authorised person but who

has permission to accept deposits, is to be transferred to another body which will carry it on in the UK”.

34. If the first condition applies, section 106(4) provides that it is immaterial whether the business to be transferred is carried on in the UK.
35. In the instant case, the first of the alternative conditions in section 106(2) is satisfied by the proposed Scheme. SanUK is a UK-authorized person with permission to accept deposits and part of its business is being transferred to Banco.
36. As regards section 106(1)(b), part of SanUK’s transferring business includes the accepting of deposits. As at 30 April 2021, the Transferring Business includes approximately £2 billion of assets and £3 billion of liabilities, comprising approximately, (i) 844 bank accounts; (ii) 292 interest rate and FX derivatives and structured deposits; (iii) 172 loan transactions; and (iv) 260 trade finance transactions. As at 30 April 2021, approximately £2.8 billion of the £3 billion of transferring liabilities constitutes client deposits.
37. As regards section 106(1)(c), the Scheme is not an excluded scheme, nor is it a ring-fencing transfer scheme. An excluded scheme is one where the transferor concerned is a building society or credit union; or the scheme is one to which Part 27 of the Companies Act 2006 (mergers and divisions of public companies) applies.
38. It is also a pre-requisite of any order sanctioning a banking business transfer scheme that:
 - i) any requirement prescribed by the Regulations has been complied with: section 108(2). In the case of banking business transfers, these are set out in para 5 of the Regulations and relate to public notice and the supply of copies of the application and the Scheme to the Regulators;
 - ii) the appropriate certificate has been obtained from the relevant authority as to the adequacy of the financial resources of the transferee, taking the scheme into account: section 111(2)(a); and
 - iii) the transferee is authorised to carry on the business to be transferred or will be so authorised prior to the Scheme becoming effective: section 111(2)(b).
39. I have already indicated above that SanUK has complied with the notification requirements prescribed by para 5 of the Regulations. As to the requirement in section 111(2)(a), the relevant authority is the PRA, which issued the relevant certificate on 24 May 2021 to the effect that, taking the proposed transfer into account, the SLB possesses adequate financial resources. I am also satisfied on the evidence before me that the SLB is authorised to carry on the business to be transferred, such that the condition in section 111(2)(b) is also satisfied.
40. Accordingly, the jurisdictional requirements are met in relation to sanctioning of the Scheme.

Discretion

41. In addition to satisfaction of the jurisdictional requirements to which I have referred, the Court must also consider, in all the circumstances of the case, whether it is appropriate to sanction the Scheme: see section 111(3) FSMA.
42. The approach to the exercise of the Court’s discretion under section 111(3) was considered recently by the Court of Appeal in Re Prudential Assurance Company Ltd and Rothesay Life Plc [2020] EWCA Civ 1626 (“Prudential”). Although the transfer scheme in that case related to an insurance business transfer of annuity policies, some of the more general observations of the Court of Appeal are of relevance to the instant case.
43. The Court of Appeal first noted, at paragraph 39, that

“Given the wide range of businesses that may be transferred under Part VII and the even wider range of circumstances in which such transfers may be proposed, it is immediately apparent that application of the deliberately broad terms of section 111(3) will require consideration of different factors, depending on the business and the circumstances. There can be no single test nor a single list of factors that can be applied in all cases.”
44. Consistently with that approach, at paragraphs 76-77 of its judgment, the Court of Appeal identified some of the different types of insurance business and some of the different circumstances in which Part VII schemes might be proposed. It then added, at paragraph 78,

“The discretion of the court has frequently been said to be unfettered and genuine and not to be exercised by way of a rubber stamp ... That is true but, as in the exercise of all discretions, the court must take into account and give proper weight to matters that ought to be considered, and ignore matters that ought not properly to be taken into account...”
45. In answering the question of what factors might be relevant and what factors should not be taken into account, the Court of Appeal in Prudential sounded a warning at paragraph 79 of its judgment not to treat certain earlier authorities as a comprehensive statement of the factors that were to be applied by the Court in any given insurance business transfer case. The Court pointed out that many of the factors mentioned were relevant to schemes for the transfer of certain types of insurance business, but not others. A similar point must apply to banking business transfer schemes and indeed echoes an earlier observation to similar effect by David Richards J (as he then was) in the context of a banking business transfer scheme in Re ING Direct NV [2013] EWHC 1697 (Ch) at paragraph 8.
46. In ING Direct, having made that preliminary point, David Richards J then set out his approach to sanction of a banking business transfer scheme,

“The issue for the court in relation to a transfer of banking business, as I see it, is primarily whether the interests of those affected ... will be adversely affected by the transfer and, if they will be, whether there are sufficient mechanisms put in place in relation to such adverse changes as to make it appropriate to sanction the scheme. It is not, I think, the case that it would never be appropriate to sanction a business transfer if there were some adverse change to the position of those affected. It must inevitably be a question of degree and judgment in the particular circumstances of the case. However, I think it is equally fair to say that in circumstances where the transfer is being effected in order to facilitate the commercial decision of the transferor to dispose of a business it no longer wishes to hold, those whose interests are to be transferred are entitled to expect as a general rule that their interests will not be prejudiced by such a transfer.”

47. I respectfully agree with that approach. In the case of a banking business transfer scheme, in addition to the transferring customers, the parties potentially affected are also likely to include the non-transferring customers of the two banks involved, together with any employees of the transferring business.

48. When considering the exercise of discretion, it is also appropriate to consider the observations of the Court of Appeal in Prudential as to the importance and weight that should be attached by the Court to the opinions of any independent expert and the Regulators. A report on the scheme is required from an independent expert under section 109 in the case of an insurance business transfer scheme, and the Regulators invariably also provide reports to the Court setting out their views of the scheme in such cases. The independent expert’s report invariably expresses an opinion upon whether the transfer scheme is likely to have a material adverse effect upon the parties affected by the transfer, and what mitigations have been undertaken by the parties to deal with any such effect.

49. In that regard, the Court of Appeal stated, at paragraphs 81-83,

“81. The first duty of the court is carefully to scrutinise the reports of the independent expert and the Regulators, and the evidence of any person required to be heard under section 110 including those that allege that they would be adversely affected by the carrying out of the scheme. The court must understand the opinions presented and is entitled to ask questions about them as necessary. It will do so, in particular, with a view to identifying any errors, omissions, or instances of inadequate or defective reasoning.

82. In the absence of such defects, however, the court will always, in exercising its discretion, accord full weight to the opinions of the independent expert and the Regulators. That does not mean that the court can never depart from the recommendations of the expert or the non-objections of the Regulators, but it does mean that full weight must be accorded to them, so that a court would not depart from such

recommendations and non-objections without significant and appropriate reasons for doing so. This is particularly so in relation to the financial and actuarial assessments required as regards the security of financial benefits. Whilst the judges hearing Part VII applications have considerable experience of the actuarial and specialist issues reported on by both the expert and the Regulators, the court is not itself an expert and should not substitute its own expertise for that of the entities required or entitled by statute to proffer those opinions.

83. This approach to the exercise of the court's discretion applies to the crucial question of whether the proposed scheme will have any material adverse effect on policyholders, employees or other stakeholders. An adverse effect will only be material to the court's consideration if it is: (i) a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case, (ii) a consequence of the scheme, and (iii) material in the sense that there is the prospect of real or significant, as opposed to fanciful or insignificant, risk to the position of the stakeholder concerned. In some cases, it may also be relevant for the court to consider whether there would be such material adverse effects in the event that the scheme was not sanctioned.”

50. As I have indicated, those observations were made in the context of an insurance business transfer scheme. The essential difference in the instant case, however, is that there is no requirement in section 109 FSMA for a report from an independent expert in relation to a banking business transfer scheme. The policy reason for that difference is unclear. In written submissions following the hearing, counsel for SanUK suggested that one possible policy reason might be that, in contrast to insurance business transfer schemes where policyholders are often unable to change provider, even if they consider that transfer adversely affects their interests, the customer of a bank who is dissatisfied with a transferee is more likely to be able to switch to another bank. I agree that this is a likely reason for the difference in approach.
51. The consequence, however, is that the Court considering a banking business transfer scheme will not have the advantage of an expert report prepared in accordance with the statute and expressing an independent opinion, for example, upon the likely effect of the scheme upon interested parties, or upon the materiality or otherwise of any potential adverse effect which has been identified.
52. Likewise, so far as the Regulators are concerned, whilst their invariable practice is to provide reports to the Court in relation to an insurance business transfer scheme, that is not the case for banking business transfer schemes. As such, whilst naturally the views of the Regulators would be given full weight if they were to exercise their right to appear at the sanction hearing of a banking business transfer scheme, if they do not exercise that right, the Court will not have the benefit of the Regulators' expertise on the matters which it has to decide.
53. In such circumstances in which there is no independent expert report or input from the Regulators on a banking business transfer scheme, the issue arises, in light of the

observations in Prudential, as to how far the Court should go in applying its own experience of specialist financial and regulatory matters gained from hearing Part VII schemes.

54. Mr. Moore QC submitted that where there is no dispute concerning an applicant's evidence, it would be contrary to the legislative scheme to require applicants to bolster their application with expert evidence. I do not accept that submission.
55. In all Part VII scheme cases, whether or not they are opposed, the Court has the same discretion as to whether, in all of the circumstances of the case, it is appropriate to sanction the transfer scheme. It is true that in many banking business transfer schemes the Court has been, and may well be, sufficiently confident to form a view on specialist matters from its own experience, together with any explanation of such matters provided by way of evidence and submissions.
56. The Court may also be assisted by evidence that the Regulators have been consulted and kept informed by the applicant during the development of a scheme, together with evidence that the Regulators have been provided with copies of the application for sanction and supporting evidence in advance of the hearing. Although the decision of the Regulators not to attend the hearing cannot of itself satisfy the Court that it would be appropriate to sanction a scheme, if, in light of such engagement, the Regulators have chosen not to exercise their right to appear, this can legitimately be taken as an indication that they have no material concerns about the scheme that they feel that they should draw to the attention of the court: see ING Direct at paragraph 6.
57. However, if, in a particular case, the assessment of any relevant factor requires more specialist expertise, the Court hearing the application must be entitled to ask for suitable CPR-compliant expert evidence to be obtained for its assistance. It is not possible to attempt to anticipate the issues on which such assistance might be required in any particular case, but if applicants anticipate that such an issue might arise at sanction, they can and should raise it by way of an application for directions in advance of the sanction hearing.
58. I therefore turn to apply these principles to the Scheme in the instant case.

The financial impact of the Scheme upon SanUK and Banco

59. I shall first consider the anticipated impact of the Scheme on the overall financial position of both SanUK and Banco, and hence, by extension, the effect of the Scheme on the financial interests of the non-transferring customers of those banks.
60. This is a topic of potential significance, particularly to SanUK, because SanUK and its subsidiaries comprise the ring-fenced bank group (the "RFB Sub-Group"), and provide services to UK retail and small business customers. If the Scheme might have a material adverse impact on the financial position of the RFB Sub-Group and the retail and small business customers which will be left behind in it, that would obviously be an important factor in deciding whether to exercise my discretion to sanction the Scheme.
61. The evidence in relation to the financial impact of the Scheme on the RFB Sub-Group was set out in the witness statements of Mr. Madhukar (Duke) Dayal, the CFO of SanUK. Mr. Dayal summarised the results of an internal "Stakeholder Impact

Analysis” which was conducted by teams within SanUK and/or the SLB, which were each “overseen and approved by a responsible senior internal stakeholder with relevant expertise”. That analysis assessed, among other things, the effect of the Scheme on the financial position of the RFB Sub-Group as at 30 April 2021 on the assumption that the Scheme proceeds in accordance with its intended timetable.

62. According to Mr Dayal, the Stakeholder Impact Analysis showed that the effect of the Scheme on the capital and liquidity ratios of the RFB Sub-Group is not expected to be material; that the Scheme will not have a material impact upon the overall financial position of the RFB Sub-Group; and hence that the transfers will not have a material impact upon non-transferring account holders, other customers or stakeholders of SanUK.
63. Mr. Dayal explained that the financial detail behind those conclusions is that the expected consequences of the Scheme, as at 30 April 2021, are that, (i) there will be a 3.4 per cent. decrease in SanUK’s level of risk-weighted assets (i.e. a reduction of £2.4 billion from £71.4 billion to £69 billion); (ii) the RFB Sub-Group’s common equity tier 1 ratio is expected to increase by 54 basis points (0.54%) from 15.56% to 16.11%; and (iii) the RFB sub-group’s leverage ratio is expected to increase by six basis points (0.06%) from 5.26% to 5.32% and its liquidity coverage ratio is expected to increase by 3.3% from 134% to 137.3%.
64. Although no explanation of those metrics was provided in the evidence, at my request, Mr. Moore QC provided a helpful summary as follows,
- i) Common Equity Tier 1 (“CET1”) is a component of regulatory capital of a firm. It is used to describe the core capital of a firm and includes its share capital and certain other reserves.
 - ii) Risk Weighted Assets (“RWA”) is the value of assets held on a firm’s balance sheet, adjusted to reflect certain risks associated with the asset depending on its type. A RWA value is also ascribed to undrawn commitments and other off balance sheet items of the firm.
 - iii) CET 1 Ratio: This metric expresses a firm’s CET 1 capital as a percentage of its Risk Weighted Assets. The ratio effectively determines the minimum amount of core capital that the firm must hold against its assets in order to reduce the risk of insolvency.
 - iv) Leverage ratio: This regulatory metric is determined by dividing the firm’s Tier 1 capital by its leverage exposure. It allows for the assessment of the risk of excessive leverage in financial institutions. It takes into account balance sheet size with some adjustments for derivatives, funding of securities operations and off-balance sheet items.
 - v) Liquidity coverage ratio (“LCR”): LCR is a regulatory metric designed to ensure that the firm has sufficient high-quality liquid assets to meet its short term obligations (cash outflows over 30 days) on an ongoing basis and withstand a stress scenario (idiosyncratic stress or market stress).

65. As to the position in respect of Banco, the evidence of Mr. José García Cantera, the CFO of Banco, was that the SLB represents a small part of the overall finances of Banco, and that based upon its capital levels as at 30 April 2021, Banco will remain compliant with its capital requirements following receipt of the Transferring Business. Mr. Cantera stated that although there will be a marginal increase to Banco's minimum requirement for own funds and eligible liabilities, this is expected to be met within existing limits. Mr. Cantera further expressed the opinion that the changes to the capital and liquidity ratios of Banco following the Scheme are not expected to be material nor to have any negative impact on its customers.
66. As to the detail, Mr. Cantera stated that, as at 30 April 2021, (i) there will be a 0.75% increase in the level of Banco's risk-weighted assets (an increase of €2.7 billion from €362.1 billion to €364.8 billion); (ii) Banco's common equity tier 1 ratio at a solo level is expected to decrease by 12 basis points (0.12%) from 17.12% to 17.00%; and (iii) Banco's leverage ratio is expected to decrease by 5 basis points (0.05%) from 10.80% to 10.75%, and its liquidity coverage ratio is expected to decrease by 4.8% from 148.4% to 143.6%.
67. I do not doubt that the factual evidence of Mr. Dayal and Mr. Cantera accurately summarises the internal analysis that has been conducted by the banks. However, I have no specific evidence that such analysis has been subject to external verification. Nor, for reasons that I have explained, do I have any independent expert report confirming that the anticipated financial effects to which Mr. Dayal and Mr. Cantera refer are indeed immaterial, as they suggest. I also do not have any direct evidence from the Regulators as to their opinion on such matters.
68. In these circumstances, I raised with counsel the question of whether the accuracy of the evidence and the (im)materiality of the prospective changes were matters upon which I should require SanUK to provide suitable independent expert evidence; and whether, and if so, to what extent, I could make any assumption about the views of the regulators in the UK and Spain on such matters.
69. Mr. Moore QC submitted that I do not need any such expert or other assistance. He submitted that I could form a view of the evidence on the basis of my own knowledge and experience, supplemented by his explanation of the financial metrics. He submitted that I should accept the evidence and opinions offered by Mr. Dayal and Mr. Cantera that what are very small proportionate changes to the capital and liquidity metrics of the RFB Sub-Group and Banco mean that the Scheme will have an immaterial impact on customers of those banks.
70. I have concluded that, on the particular facts of this case, I can safely proceed without asking for further evidence or expert assistance. I do so for the following reasons.
71. First, both Mr. Dayal and Mr. Cantera indicated that in preparing their evidence they were supported by teams with relevant expertise within their respective banks. Given that both banks are significant financial institutions which are subject to advanced regulatory regimes and to continuing prudential supervision and assessment by the PRA (for SanUK) and by the JST for Banco, I believe that it is reasonable to start from an assumption that such internal expertise is sophisticated, and that the results of the internal analyses by both banks are likely to be accurate.

72. Second, I note that the projected effect of the Scheme upon the RFB Sub-Group is to increase its leverage ratio and liquidity coverage ratio rather than to decrease those metrics. That simple fact does not suggest that the Scheme will cause any, still less any material, adverse impact upon the financial position of the RFB Sub-Group.
73. Third, although the corresponding effect upon Banco is negative, Banco is a very sizeable institution indeed, and the additional materials provided by Mr. Moore QC show that on those measures for which there is a regulatory minimum, Banco's post-transfer position will remain significantly above those minima. For example, if the transfer had occurred on 30 April 2021, Banco would have a CET1 Ratio of 17.00%, which is well above its minimum CET1 Ratio of 7.85%. Likewise, Banco's leverage ratio of 10.75% in such a scenario would be significantly in excess of the minimum of 3% which will come into force at the end of June this year under the relevant EU Regulation (CRR II). Banco's post-transfer liquidity coverage ratio (as at 30 April 2021), would be 143.6%, which would be well above its regulatory minimum of 100%.
74. Fourth, there are two sets of regulators for whom any adverse financial impact of the Scheme would be highly relevant, namely the PRA and FCA in the UK, and the JST in Spain. The evidence, as supplemented by Mr. Moore QC's written submissions, shows that there has been close engagement between San UK and Banco and those regulators in the lead-up to the application and sanction hearing.
75. In particular, the UK Regulators have been provided with multiple iterations of the evidence in support of the Scheme, including the capital and liquidity metrics to which I have referred. The PRA also has a continuing supervisory role in relation to SanUK and, as I have indicated, it is considering Banco's application for authorisation of the SLB after the TPR. Having, it must be assumed, discharged its supervisory functions in that regard, the PRA was content to issue the certificate required by s.111(2)(a) FSMA. I was also told that Mr. Moore QC shared his supplemental submissions on these points with the Regulators in the UK, who have not sought to make any comments on them to me.
76. The engagement with the Spanish regulators has not been as detailed, and has not involved sharing the Scheme documentation itself. Banco has provided summary information and responded to questions from the JST on the liquidity and balance sheet impact of the Scheme. The figures provided related to the effect of the transfer on Banco as at 30 June 2020 and 31 December 2020, but the JST has not seen the more recent figures as at 30 April 2021 referred to above. However, the information and cooperation with which the JST was provided led to the MoEA, following consultation with other agencies in Spain, granting its authorisation for the proposed transfer of business to Banco in March 2021. The JST did not object to a modification of the proposed activities of the SLB notified to it in April 2021.
77. On the basis of that evidence, I consider that I am entitled to attach real weight to the fact that the UK Regulators have not expressed any concerns as to the accuracy of the figures given by Mr. Dayal and Mr. Cantera, or suggested that they disagree with Mr. Dayal or Mr. Cantera's opinions that there will be no material adverse effect upon the capital adequacy or solvency of either Banco or the SLB (and hence the interests of their other customers) following the implementation of the Scheme.

78. The same point applies with equal force when considering whether the Scheme in any way impinges upon SanUK's compliance with the UK's ring-fencing regime. This is a matter falling squarely within the PRA's supervisory remit, and which I would expect to have been considered very carefully by the PRA before the Scheme was presented to the Court. This is particularly so in circumstances where the structure and implementation of Santander's ring-fenced UK operations were the subject of very significant work in the relatively recent past, culminating in the Order of Hildyard J sanctioning the ring-fencing transfer scheme to which I have referred.
79. It is clear that the Spanish regulator, the JST, has not been as closely involved in the preparation for the Scheme, but there has been engagement with the JST and MoEA in Spain, and I place some weight on the fact that there has been no indication of any concern from the JST or MoEA that the Scheme will present any material risk to Banco.
80. In these circumstances, I am content to conclude that the Scheme presents no real or significant risk to the interests of the non-transferring customers of SanUK or Banco.

The impact of the Scheme upon Transferring Customers

81. The evidence indicated that SanUK has undertaken an extensive analysis of the impact of the Scheme on Transferring Customers, employees, suppliers and other affected stakeholders. The analysis considered, *inter alia*, the changes that will arise for each stakeholder of SanUK and/or the SLB as a result of the Scheme, the qualitative and quantitative impact those changes might have on stakeholders; and (where relevant) the mitigating steps or factors relevant to the change. That analysis was summarised in the "Stakeholder Impact Analysis" to which I have referred and was supplemented by the evidence of Mr Dayal.

Administrative issues

82. A number of the issues raised in the Stakeholder Impact Analysis can fairly be described as administrative, and it is not necessary to set them out in detail. For example, Transferring Customers with current and/or deposit accounts with SanUK, or which use the BACS payment system, will receive new IBANs, account numbers, sort codes and/or other payment details (as applicable), and will need to update their own systems and/or notify third parties of those changes. Mr Dayal also described certain relatively minor differences in account functionality as between SanUK and the SLB, such as the dates and times at which the "Faster Payments" service will be available to them, the ability to set up standing orders, and the number of administrators it is possible to set up on an account immediately upon the transfer.
83. I do not place very much weight on those administrative issues, which are inevitable in circumstances where Transferring Customers will be transacting with a different entity. I have no reason to suppose that the administrative burden of change is very great but, if any customer considers it unduly burdensome, then in most cases it will be perfectly possible for that customer to take their business elsewhere. SanUK and Banco have an obvious incentive in ensuring that does not happen by making the transition as seamless as possible. The evidence I was shown suggested that this is precisely what they are seeking to do through extensive engagement with Transferring Customers. That includes the communications programme that I referred to above, and encouraging Transferring Customers to engage with their relationship manager, or appointing a

migration implementation manager (where appropriate), to guide Transferring Customers through the changes relevant to them.

84. I should also note that, between April and early June 2021, there have been a number of successful “migration dress rehearsals” to help ensure that the planned execution steps will operate as expected, and further work to ensure the operational readiness of the SLB. I have no reason to doubt that all available steps are being taken to ensure a smooth transition, which is obviously very much in the interests of both SanUK and the SLB as part of the same group.

Substantive issues: general

85. A number of factors identified by Mr Dayal are, at least in principle, capable of being more material than those administrative issues.
86. It is worth saying at the outset that the pragmatic answer in respect of most of the issues is likely to be the same: the Transferring Customers are sophisticated entities which can be expected to have formed their own view of the benefits (or disbenefits) of the Scheme, and are not, so far as it is possible to tell, contractually or commercially bound to remain with the SLB for a long period (if at all) following the implementation of the Scheme. Accordingly, those customers which take the view that the disbenefits of the Scheme are too great can simply take their business elsewhere. The present Scheme is therefore very different in this respect from an insurance business transfer scheme in which policyholders have little, if any, ability to seek a new provider if they are unhappy with the terms of the scheme.

Credit rating issues

87. As at 12 March 2021, Banco and SanUK had parity in respect of their short-term credit ratings with Standard and Poor’s (“S&P”) and Moody’s Investor Service (“Moody’s”), whilst the short-term credit rating with Fitch Ratings Inc. (“Fitch”) for Banco was one notch lower than for SanUK. As at the same date, Banco had investment grade long-term issuer credit ratings with S&P, Moody’s and Fitch (A/A2/A- respectively) which were up to two notches lower than SanUK’s rating (A/A1/A+). On instructions, Mr Moore QC provided some additional detail in respect of credit ratings, but it was very much of a piece with the information set out in the evidence, namely, that SanUK’s credit ratings are, on some but by no means all measures, slightly higher than those of Banco.
88. A related but distinct impact concerns the fact that certain Transferring Customers may be restricted from transacting with Banco or the SLB (for example, under the terms of internal investment policies or risk appetite frameworks). This might be because Banco is a Spanish entity rather than a UK ring-fenced entity, or because of the differences in credit rating.
89. Mr. Moore QC made the perfectly fair point that the rating differences appear small in the context of what are, on any view, robust credit ratings, and to that extent the potential for adverse impacts could also be regarded as small. However, where a change in credit rating might cause an issue, these two potential impacts cannot be mitigated by any steps available to either SanUK or Banco because they depend entirely on the policies or views of third parties.

90. I consider, however, that a further answer to the point was given by Mr Moore QC on instructions at the hearing, namely, that nine Transferring Customers had made specific inquiries about the issue of changed credit ratings, and three of them subsequently decided to close their accounts and (one assumes) take their business elsewhere. This reinforces my view that the sophisticated clients which make up the Transferring Customers under the Scheme will doubtless have taken their own view as to whether the Scheme has a material adverse effect on their particular interests in a way that cannot adequately be mitigated by SanUK or the SLB. Most will then have taken their own course of action to address the issues: and as I have said, no customer has come forward to object to the Scheme on the basis that they would suffer prejudice that could not be addressed in this way.

Recognition of judgments

91. Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (i.e. the Recast Brussels Regulation) no longer applies as between the UK and the EU. Moreover, the UK has not (yet) been permitted to accede to the Lugano Convention. Accordingly, a Transferring Customer which obtains a judgment from the English court against Banco or the SLB may experience additional uncertainty, cost and administrative difficulties in enforcing that judgment in Spain than they would have had in enforcing it against SanUK in England in the absence of the Scheme.
92. Mr Dayal acknowledged in his evidence that there are no real mitigating steps to be taken in this regard, but suggested that this issue is unlikely to arise in practice, and any additional burden and cost would not be material.
93. In practical terms, a creditor with an English court judgment against Banco will have the ability to seek to enforce the judgment against the assets of Banco in the UK. Although significantly lower than the assets of SanUK, the assets of the SLB still amount to tens of billions of euros, and, as at 4 June 2021, Banco also owns 77.67% of the shares in Santander UK Group Holdings plc, the immediate direct parent of SanUK. It is therefore unlikely in the extreme that a judgment creditor would be unable to find sufficient assets of Banco in the UK for the purposes of enforcement and would be required to pursue enforcement in Spain. Accordingly, any such risk to a hypothetical judgment creditor is negligible.

Complex cash management customers

94. There are a number of specific potential impacts for customers with more complex cash management arrangements who have elected to begin onboarding with the SLB prior to the Scheme, known as “Dual Running Cash Management Customer Groups”. The effect of participating in that process is that, for a short time, such customers may have transactions or arrangements with both SanUK and the SLB, with potential effects on rights of set-off and netting, the administration of their accounts, and credit limits.
95. The mitigation in respect of these customers was described by Mr Dayal as involving extensive and detailed communications and support from bankers, product specialists and migration implementation managers, and his evidence stated that such customers would continue to be supported until the migration of all of their business. I have no

reason to doubt that this is the case and, as I have said, nobody has appeared to suggest otherwise.

Chief Financial Office (“CFO”) counterparties

96. As at 15 June 2021, a small number of Transferring Customers are also potential market counterparties of the CFO division which is SanUK’s centralised function for managing the funding, liquidity and capital of the SanUK group. Those Transferring Customers are typically financial institutions which are counterparties to hedging or liquidity management transactions used by SanUK to facilitate the management of its own balance sheet. The transactions are typically short-term in nature and there is no obligation on the market counterparty to renew the transactions on maturity. As at 15 June 2021, only two such Transferring Customers had “live” positions with the CFO division.
97. The key point in relation to any customers potentially affected by the issue is that their transactions are typically short-term transactions in respect of which there is no obligation to renew beyond their term. Accordingly, if and to the extent that such customers are unhappy with the impact of the Scheme, it will be open to them to transact with a different bank without, it seems, suffering any real prejudice.

Employees

98. Finally in respect of potential impacts, Mr Dayal’s evidence also dealt with the impact of the Scheme on employees and pensions. In short, about 280 employees of SanUK will transfer to the SLB, primarily under TUPE, with approximately 25 roles at SanUK and three roles at the SLB provisionally at risk of redundancy. Some threat to jobs is almost invariably the result of any business transfer, and in the absence of any employee or representative appearing to oppose the Scheme, I do not consider that this is a sufficiently material factor to justify refusing to sanction the Scheme.
99. As to pensions, Mr Dayal explains that appropriate steps are being taken to reduce the risk that a small number of employees to be transferred from SanUK will be economically prejudiced by the transfer. I am also satisfied that this is sufficient mitigation of that possibility.

Specific communications with customers

100. As I indicated above, SanUK undertook an extensive communications exercise with Transferring Customers and other stakeholders and received 46 communications relating to the Scheme. Mr Moore QC took me to a spreadsheet which set out, on an anonymised basis where necessary, the nature of the inbound communications and SanUK’s responses to them. Most of the communications concerned purely administrative or clarificatory matters – for example, customers inquiring as to whether they were in scope of the transfer at all and, if so, which of their accounts would be affected.
101. None of the communications from customers were objections to the Scheme *per se* and, based on the descriptions in the spreadsheet, it was clear that the issues were in most cases specific to the circumstances of the individual customers raising them, rather than indicative of some broader difficulties caused by the Scheme.

102. I shall give two examples to which I was taken by Mr Moore QC, but the short point is that I am satisfied that none of the communications should change my overall assessment of the expected impact of the Scheme, and it appears to me that the queries or concerns raised by customers as to the anticipated impact of the Scheme were dealt with appropriately. Indeed, the specific communications were helpful illustrations of the broader point I have already made, which is that if SanUK or the SLB are unable to resolve or address customers' concerns or queries, those (sophisticated) customers will either accept the position or take their business elsewhere.
103. Turning to the specific examples, first, one overseas entity in the Banco group ("A") notified SanUK of its concern in relation to the proposed transfer to the SLB of two standby letters of credit issued by SanUK in favour of A at the request of a Transferring Customer. The concern appeared to relate to the ability of A to incur any further credit exposure directly to Banco (or its branches), which I was told would have caused a breach of local regulations.
104. The first instrument expired in May 2021 and would not therefore have transferred to the SLB under the Scheme. To resolve the concern about the second instrument, a separate entity within the Banco group ("B") issued a replacement instrument on identical terms in favour of A, with SanUK issuing a counter-guarantee in favour of B at or around the same time. In fact, the second instrument was cancelled shortly thereafter, such that only the counter-guarantee will transfer under the Scheme.
105. The second specific communications to which I was referred by Mr Moore QC concerned a banking platform referred to as GBOL, which was excluded from the Transferring Business. The platform hosts SCIB UK and non-SCIB UK business, and so it cannot be transferred to the SLB. The cost of replicating the platform in the SLB and of migrating customers to a new platform would, the applicant says, be disproportionate in light of there being, as at 9 June 2021, only five Transferring Customers in total using the platform, comprising two separate Transferring Customer groups.
106. Those two Transferring Customer groups were therefore sent notices terminating their accounts on the GBOL platform. One Transferring Customer group formally expressed its disagreement with the notice period given for the termination of these accounts and, as at 11 June 2021, discussions were ongoing with the dissatisfied group and the termination notices have been suspended pending further investigation.

Conclusion

107. For the reasons I have given above in respect of each issue I have identified, I am satisfied that there is no basis on which to conclude that any of the potential impacts of the Scheme will have a material adverse effect on Transferring Customers such that I should decline to sanction the Scheme.

Ancillary orders under s.112 FSMA

108. In addition to seeking the sanction of the Scheme, SanUK also seeks ancillary orders under s.112 FSMA. Those ancillary orders relate primarily to contractual amendments to be effected by the Scheme to contracts transferring under the Scheme from SanUK to the SLB, and are said to be required or desirable as a result of the effect of the Scheme

in order to align the applicable terms and conditions to the SLB's operations and regulatory status. There are also arrangements for shared security and the sharing of the benefit of guarantees between SanUK and the SLB, and a three-month moratorium on certain rights of set-off that might otherwise be exercisable by Banco or the SLB as a result of the Scheme.

109. As to the applicable legal principles, a business transfer scheme under Part VII must effect a transfer of the relevant type of business (here, a banking business), but there is no requirement that it should do nothing else but that: see Re Norwich Union Linked Life Assurance Limited [2004] EWHC 2802 (Ch), per Lindsay J at [11].
110. Whilst there may be some cases in which it is necessary to investigate closely whether it is appropriate to exercise the jurisdiction under s.112 (for example, where the orders sought are not truly ancillary at all but in fact seek much wider-ranging or freestanding relief), in the instant case the evidence shows that the significant majority of the business to be transferred involves deposit-taking and there does not appear to be any impermissible collateral purpose to the orders sought under s.112. I am satisfied that those orders are indeed ancillary, and that it is appropriate to grant them to ensure the efficient conduct of the business following the implementation of the Scheme.
111. Given the necessary complexity and technical nature of the Scheme, and as was done in relation to ring-fencing transfer schemes, it is intended that a summary of the Scheme will be attached to the Order to aid the reader's understanding of the Scheme which the Court has sanctioned. I agree that that is a sensible approach. I suggested to Mr Moore QC that the summary might benefit from a minor revision to make clear the significance of the USB flash drive on which the details of the Transferring Customers are contained, and which is referred to in terms in the Order, and he produced satisfactory revised wording.

Sanction

112. I will therefore sanction the Scheme and grant the Order on the terms sought, subject to the minor revision which I suggested to the summary document.