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Case no CR-2021-002127

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
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: 24/10/2022

Before :

THE HONOURABLE MR JUSTICE TROWER

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IN THE MATTER OF PHOENIX LIFE LIMITED
- and -
IN THE MATTER OF REASSURE LIFE LIMITED
-and-
IN THE MATTER OF
PHOENIX LIFE ASSURANCE EUROPE
DESIGNATED ATCIVITY COMPANY
-and-
IN THE MATTER OF THE FINANCIAL
SERVICES AND MARKETS ACT 2000

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- -

MR MARTIN MOOORE KC (instructed by **Linklaters LLP**) for the **Applicant**

Hearing date: 18 October 2022

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Approved Judgment

This judgment was handed down remotely at 12 noon on 24 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Mr Justice Trower:

Introduction

1. On 18 October 2022, I sanctioned an insurance business transfer scheme (the "Scheme") giving effect to the transfer to Phoenix Life Assurance Europe DAC ("PLAE") of certain business carried on by Phoenix Life Ltd ("PLL") and ReAssure Life Ltd ("RLL"). The application for sanction was made by PLL and RLL as transferors and PLAE as transferee pursuant to section 107 of the Financial Services and Markets Act 2000 ("FSMA"). This judgment explains the reasons for the order I made.

2. RLL, PLL and PLAE are all wholly owned subsidiaries in a group of companies the ultimate holding company of which is Phoenix Group Holdings plc. They all appeared at the hearing by Mr Martin Moore KC.

3. Both PLL and RLL are large UK insurers engaged in closed-fund run off in the long-term sector. They are English companies and are both authorised to carry on long term business by the Prudential Regulation Authority ("PRA"). Between them PLL and RLL have approximately 4 million policies. As at 30 June 2022, PLL's net best estimate liabilities ("BEL") under Solvency II (which continues to be the applicable regulatory regime for insurers in the UK) was £44.467bn. As at the same date, RLL's net BEL was £5.939bn. The excess assets of PLL and RLL after their solvency capital requirement ("SCR") were £1.58bn and £216m respectively. PLL's solvency coverage ratio was 164% and RLL's was 1,229%, both as at 30 June 2022.

4. PLAE is an Irish designated activity company which has been established for the purposes of the Scheme. It is now authorised by the Central Bank of Ireland ("CBI") to transact insurance business in respect of the life insurance classes which cover the policies to be transferred under the Scheme. As I shall explain later in this judgment, PLAE is being capitalised to a level considered to be sufficient to accept the transfers as part of the arrangements for which the Scheme provides.

5. Both the PRA as prudential regulator of PLL and RLL and the Financial Conduct Authority ("FCA") as conduct regulator of PLL and RLL are entitled pursuant to section 110(1) of FSMA to be heard on the application for sanction of the Scheme. Neither authority exercised that right. However, each of them produced two detailed reports to the court explaining their respective positions in relation to the application. The PRA concluded that, in light of its statutory objectives, it was not aware of any issue that would cause it to object to the Scheme and accordingly did not do so. The FCA expressed itself satisfied that the Scheme is within the range of reasonable and fair schemes available to PLL and RLL and confirmed that it did not object to the Scheme.

6. Any policyholder (and indeed any other person) who alleges that they would be adversely affected by the carrying out of the Scheme is also entitled pursuant to section 110 to be heard on the application for sanction. In the event, no such persons appeared at the hearing, although PLL and RLL received a small number of communications from or on behalf of policyholders which could properly be classified as objections to

the Scheme by those who regarded themselves as adversely affected by it. I have read the relevant correspondence and transcripts of telephone calls and I will come back to consider the substance of what was said later in this judgment.

The rationale for the Scheme

7. The business to be transferred by the Scheme had been written in five EEA states (the Republic of Ireland, Iceland, Germany, Norway and Sweden) when advantage could be taken by insurers authorised in the UK of the freedoms of service and establishment ("passporting rights") under Solvency II. Following the UK's departure from the European Union ("Brexit") those passporting rights have ceased to be available to UK insurers.

8. PLL and RLL are under a regulatory obligation to find an appropriate solution for policyholders located in EEA States who are affected by the loss of passporting rights. In order to ameliorate the impact of the loss of those rights on policyholders in Germany, Iceland, Norway and Sweden, PLL and RLL have been concerned to take such steps as are available to them to ensure continuity of services by removing the uncertainty surrounding individual EEA states' temporary permission regimes, to facilitate the ability of policyholders to obtain the full range of benefits under their policies, especially if they move between EEA countries, and to address the impact of any regulatory divergence between the UK and Solvency II. These issues are particularly acute for policyholders with long term policies which might have several decades still to run.

9. The impact of the loss of UK insurers' passporting rights on Irish policyholders is slightly different. PLL wrote business through an Irish branch on a freedom of establishment basis as well as pursuant to its freedom of services rights to policyholders resident in Ireland. As a result, PLL can continue to service the policies and operate under the Solvency II regime but, as a third country branch, PLL cannot be confident that it can continue to offer the fullest range of services available to be offered by an authorised insurer. It appears that it certainly could not do so if any Irish policyholders moved to another EEA country, because a third country branch does not have passporting rights.

10. As Mr Moore explained, the near-universal solution to these types of difficulty adopted in the UK insurance sector has been to effect an insurance business transfer of the affected policies pursuant to Part VII of FSMA to an authorised insurer in another EEA State. This is the approach that has been taken by PLL and RLL. They both determined that the issues raised by Brexit pointed to an application for the sanction of a scheme transferring the relevant business to an authorised insurer in an EEA State. Ireland was chosen because PLL already had an Irish branch, the Phoenix group had familiarity with the Irish regulatory system and Ireland is an Anglophone country with a common law-based legal system.

11. One further consequence of the position of the Irish policyholders is that PLL has also decided to promulgate an Irish transfer scheme pursuant to section 13 of the Assurance Companies Act 1909 (the "Irish Scheme"). The petition for sanction of the Irish

Scheme is currently scheduled for hearing before Mr Justice MacDonald in the Irish High Court on 1 November 2022.

12. Most of the business proposed to be transferred by PLL emanated from Ireland and comprised a range of long-term policies, classified as conventional with- profits, conventional non-profit, income protection, annuity, unit-linked (non-profit) and unitised with-profits. There is also some critical illness and term assurance business emanating from Iceland and Germany. As at 30 June 2022, the business proposed to be transferred by PLL comprised 19,630 policies with a total BEL (all of which was attributable to Irish policies) of £638 million, a material proportion of which is with-profits business.

13. Most of the business proposed to be transferred by RLL emanated from Sweden and comprised policies classified as unit-linked investment bonds, Swedish bonds, protection policies and unit-linked savings policies. There were also non-linked critical illness policies emanating from Germany and unit-linked savings and unit-linked pensions policies emanating from Norway. As at 30 June 2022, the business proposed to be transferred by RLL comprised 6,756 policies with a total BEL of £124.9 million, none of which is with-profits business.

The Scheme and its effects

14. The essential effect of the Scheme is to transfer the legal rights and obligations of PLL and RLL relating to the transferring policies together with their associated assets and liabilities (including certain outwards reinsurance) to PLAE. Mis-selling and mal-administration claims are excluded. To that extent the Scheme is simple in concept, but there are a number of elements which warrant a slightly more detailed description.

15. The first is that certain of the transferring policies will also be the subject of the Irish Scheme, thus covering the relevant policyholders in both jurisdictions and ensuring that for a sizeable body of policyholders there is no question regarding effectiveness of the transfer. As a consequence, the Scheme and the Irish Scheme are inter-conditional, and both must be sanctioned if either is to proceed.

16. In the event that the Irish High Court were to require an amendment to the Irish Scheme which necessitates a consequential amendment to the Scheme, a theoretical difficulty would arise, because by that time the Scheme will have been sanctioned. In order to deal with that eventuality, a bespoke amendment provision has been included in the Scheme which involves notifying the PRA, the FCA and the CBI and arranging a fresh hearing for this court to consider whether or not the amendment should be approved. Appropriate notifications of that hearing would be given pursuant to a permission to apply included in this court's sanction order. I was satisfied that this was an appropriate way to proceed.

17. The second element flows from the fact that PLAE is newly established. It will be capitalised by a contribution of assets sufficient to ensure that, by the effective date of the Scheme, it will satisfy what is called the Capitalisation Requirement. This is defined by the Scheme to be sufficient to ensure that PLAE has eligible own funds at least equal in value to the amount required by PLAE's capital policy immediately after the Scheme

has become effective. The evidence is that this means that PLAE's solvency coverage ratio will be and remain at 150% of its SCR. Satisfaction of the Capitalisation Requirement is the subject of an undertaking to the court by ReAssure Limited, a holding company of RLL and the parent of PLAE. PLAE has now confirmed by letter to the court that it has received sufficient funding from ReAssure Limited to satisfy what on a forward-looking basis is considered to be sufficient to satisfy the Capitalisation Requirement as at the intended effective date. If further funding is required at the effective date that will be provided pursuant to the undertaking referred to above.

18. The third matter relates to the fact that it can be seen from a comparison of (a) the number of policies to be transferred and the BEL attributable to them with (b) the totals I referred to at the beginning of this judgment, that the Scheme affects a relatively small proportion of each transferor's total business. This is of some relevance to an assessment of the impact of the Scheme on the position of the non-transferring policies, because the solvency coverage ratios of PLL and RLL are only affected to a small extent by the transfer proposed. But it is also of relevance to the treatment of the with-profits and unit-linked policyholders under the Scheme, because the equivalent funds required by PLAE in respect of the transferred business would be very much smaller than the total with-profits and unit-linked funds held by PLL and RLL in respect of which a much larger body of policyholders would continue to share.

19. For this amongst other reasons a reinsurance arrangement is to be put in place relating to the transferring with-profits and unit-linked policies. Such arrangements have been a common feature of Brexit-related Part VII transfer schemes. Their purpose was described by Snowden J in *In re Royal London Mutual Insurance Society Limited* [2019] EWHC 185 (Ch) ("*Royal London*") at [13ff] in a passage from his judgment which closely reflects the situation of PLL and RLL as follows:

> "13. As only a proportion of the policies currently in the Royal Liver Sub-Fund at Royal London are to be transferred, it would ordinarily be necessary to identify and transfer a fair split of the assets in respect of these policies and thereby to split the Royal Liver Sub-Fund. That would involve taking account of the transferring policyholders' interest in the Royal Liver Sub-Fund's inherited estate (the part of the with-profits fund not allocated to policyholders' liabilities). That is a complex process, and the evidence is that it could not be achieved before Brexit on 29 March 2019. Further, the size of the German Bond business currently allocated to Royal London's Main Fund is so small that it is thought that it could not operate economically as a stand-alone with-profits fund.
>
> 14. To address these issues, the Scheme provides that RLI's liabilities in relation to the Royal Liver Transferring Policies and the German Bonds will be immediately reinsured back to Royal London under two new reinsurance agreements (together the "New Reinsurance Agreements"). The premiums for that reinsurance will be offset against Royal London's obligation to transfer assets to RLI under the Scheme, with the consequence that RLI will be left with very few cash assets in the respective new funds, and its regulatory capital in that regard will largely comprise its rights against Royal London under the New Reinsurance Agreements. These rights will also be the subject of a security package that is designed to ensure that, in the event of insolvency of Royal London, the

> transferring policyholders would be in no worse a position than if they had remained at Royal London."

20. In the present case, the PLL with-profits policies will be allocated to PLAE with-profits funds which will mirror the with-profits funds from which they have been transferred. Likewise, the PLL and RLL unit-linked funds which are used to calculate policyholder benefits under the unit-linked policies will be replicated in PLAE. The obligation to transfer to PLAE the assets of both the with-profits funds and the unit-linked funds will then be set off against PLAE's obligation to pay premiums under the relevant reinsurance policies.

21. As was the case in *Royal London*, the advantage of the reinsurance agreements is that the transferring policyholders avoid the disadvantages of disaggregation, which arise because the PLAE funds will be much smaller than the equivalent PLL or RLL funds. The only issue which then arises is that PLAE would, as a reinsurance creditor, rank behind the non-transferring policyholders of PLL or RLL, who would continue to be direct insurance creditors in the event of their insolvency (see e.g., per Snowden J in *Re Scottish Widows Limited* [2019] EWHC 642 (Ch) ("*Scottish Widows*") at [22]). This might therefore give rise to an adverse effect for the transferring policyholders whose claims would now be only against PLAE.

22. In order to ameliorate that theoretical disadvantage, the parties have put in place a security package of fixed and floating charges to be granted by PLL and RLL to PLAE, which are designed to achieve the financial equivalent of a pari passu ranking for PLAE's reinsurance claims alongside the non-transferring policyholders and other direct insurance creditors of PLL and RLL. These arrangements are intended to have the consequence that the with-profits and unit-linked policyholders will continue to receive (in economic terms) the same ranking in any insolvency of PLL and RLL as the ranking to which they are currently entitled. They are materially similar to the arrangements described and considered by Snowden J in *Royal London* and *Scottish Widows*.

23. The final element is that the Scheme makes provision in conventional form to ensure continuity of legal proceedings and other miscellaneous matters. It also includes undertakings by PLAE not to challenge the effectiveness of the Scheme anywhere in the world and to submit to the jurisdiction of the Financial Ombudsman Service ("FOS") in the circumstances to which I will allude later and to comply with the FCA's complaints sourcebook.

The technical aspects of the application

24. On an application under section 107 of FSMA to sanction an insurance business transfer scheme, the conditions set out in section 111 of FSMA must be satisfied:

> "(1) This section sets out the conditions which must be satisfied before the court may make an order under this section sanctioning an insurance business transfer scheme, …
>
> (2) The Court must be satisfied that-

(a) … the appropriate certificates have been obtained (as to which see Parts I and II of Schedule 12);

….

(b) the transferee has the authorisation required (if any) to enable the business, or part, which is to be transferred to be carried on in the place to which it is to be transferred (or will have it before the scheme takes effect).

(3) The Court must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme."

25. I can deal with the satisfaction of the conditions referred to in section 111(2) of FSMA relatively shortly.

i) As to section 111(2)(a), I am satisfied from the evidence that the appropriate certificates under Schedule 12 have been obtained. The first of these is a from the PRA (which is the appropriate regulator for this purpose, and which gives its certificate having seen the certificate given by the CBI), confirming that PLAE will, taking the proposed transfer into account, possess the necessary margin of solvency. The second of these is a pair of certificates from the PRA under paragraph 3 and 3A of Schedule 12 as to consultation with and consent from EEA regulators.

ii) As to section 111(2)(b), I am satisfied from the evidence that PLAE has the necessary authorisation to carry on the business transferred to it. This is confirmed by a certificate from the CBI dated 26 September 2022.

26. There are a number of other technical aspects of the application on which Mr Moore made submissions in his skeleton argument. The first of these flows from the fact that the Scheme is a transitional insurance business transfer scheme within the meaning of the Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (SI 2019/710). The consequence of this is that an order may only be made sanctioning the Scheme within 2 years of IP completion day, i.e. before 31 December 2022. As the order was made on 18 October 2022, that requirement has plainly been satisfied.

27. Earlier in these proceedings, the question arose as to whether the Scheme could retain its quality as a transitional insurance business transfer scheme if it became effective after 31 December 2022. In a judgment I gave on 15 June 2022 (see *Re Phoenix Life Limited* [2022] EWHC 1796 (Ch)), I explained why the Scheme was a transitional insurance business transfer scheme and my conclusion that it would continue to be so even it only became effective after 31 December 2022 so long as the sanction order was obtained prior to that date. This conclusion was provisional in the sense that it amounted to prospective guidance given to facilitate the proper case management of the proceedings and was subject to contrary argument at this hearing by any policyholder. In the event no such argument has been made and I am satisfied that the conclusions I then reached are the basis on which this hearing should proceed.

28. I am also satisfied that the applicants have complied with the publication and notification requirements of regulations 3 and 4 of The Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations

2001 (SI 2001/3625), as amended. As is common in such cases, the court (by order of Deputy ICC Judge Schaffer dated 11 July 2022) dispensed with the obligation to comply with regulation 3(2)(b) on the basis that communication packs would be sent to transferring policyholders. These packs were approved by the PRA and included what I considered to be appropriate bespoke cover letters tailored to policy type, service provider and jurisdiction, a scheme guide and where applicable a leaflet explaining the effect of the Scheme on with-profits policies.

29. It follows that the technical requirements of the legislation have been complied with by the applicants. The important question which remained was whether I considered that, in all the circumstances of the case, it was appropriate to sanction the Scheme (section 111(3) of FSMA).

The correct approach to section 111(3) of FSMA

30. Section 111 itself contains little guidance on the approach that the court should take to the question of whether or not it is appropriate to sanction the Scheme. However, the question has recently been given authoritative consideration by the Court of Appeal in *Re Prudential Assurance Company Limited* [2020] EWCA Civ 1626 at [75ff]. Both because the judgment is recent and authoritative, and because it covers the ground comprehensively, it is convenient to set out the salient parts in full:

> "The approach to the sanction of applications under Part VII
>
> 75. The judge hearing an application for the sanction of an insurance business transfer scheme under Part VII should first, we think, identify the nature of the business being transferred and the underlying circumstances giving rise to the scheme.
>
> 76. As we have already indicated, different considerations affect different types of business. …
>
> 77. The circumstances giving rise to the scheme proposed will also affect the approach of the court. For example, many schemes will reflect commercial transactions between transferor and transferee companies for the benefit of those companies. Other schemes will be occasioned by external events (such as the departure of the UK from the European Union) or the financial or other commercial circumstances of the transferor. Some may take the form of a rescue of the business retained or transferred.
>
> 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. The correct identification of which matters fall on which side of the line in particular transfer situations has caused some confusion in this, and perhaps other, cases.
>
> 79. …

80. …

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.

80. 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.

81. 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

82. Even if the court finds that the proposed scheme will have a material adverse effect on some group or groups of policyholders, it may still sanction the scheme in the exercise of its discretion. For example, this might occur if the scheme is in the nature of a rescue of the business. If there are differential effects on the interests of different classes of person affected, the court will need to consider whether the proposed scheme as a whole is fair as between those interests.

83. The court should adopt the same approach to the exercise of its discretion (described at [82] above) when making the more general comparison between the positions that would exist with or without the proposed scheme in respect of (a) the security of the policyholders' benefits, and (b) the standards of service and corporate governance that the policyholders can expect. In many cases, this comparison will entail the court's consideration of the contractual rights and reasonable expectations of policyholders, including the standards of service and governance that can be expected if the scheme is implemented.

> 84. Once the court has undertaken the evaluations we have mentioned, the court will decide whether or not to sanction the proposed scheme, if, under section 111(3) it is, in all the circumstances of the case, appropriate to do so. It cannot require the applicants to vary or alter the scheme, even though that may sometimes be the effect of the court expressing its concerns. The choices of both the scheme itself and its detailed terms are for the directors of the transferor and transferee concerned. The primary duty of those directors is, of course, to promote the success of their companies."

31. Mr Moore emphasised a number of points which flowed from the *Prudential* judgment. First, he pointed out that the crucial question in a case such as the present is whether the proposed scheme will have any material adverse effect on policyholders (at [83]). The effect will only be material if it is a possibility that cannot sensibly be ignored, and materiality is to be judged by the question of whether there is real or significant risk to the relevant stakeholder concerned. The adverse effect must also be a consequence of the scheme. It is not necessary to show that the transfer will be beneficial to those policyholders affected by it, although he submitted that in the present case it clearly is.

32. Secondly, he submitted that *Prudential* is authority for the proposition that two factors, which in that case had been taken into account by the judge at first instance, were irrelevant to the exercise of the court's discretion. The first of these was the potential for non-contractual support from other companies in the group of which either the transferor or transferee forms part. I agree that the Court of Appeal held that this is not a relevant factor for the reasons outlined in [103-104] of its judgment. The second was that it is immaterial that policyholders had chosen the transferor for reasons of age, venerability and reputation or that they had assumed that their policies would not be transferred to another provider. I agree that the Court of Appeal held that these are subjective factors, which are not to be taken into account in determining whether or not to sanction the scheme.

33. Thirdly, as to which see [77] of the judgment in *Prudential*, it is relevant that the present case is one of a scheme proposed to deal with the consequences of an external event. This does not mean that the court should adopt a different set of principles. However, there may be no perfect solution to the difficulties caused by Brexit (per Snowden J in *Royal London* at [40]-[43]) and, in that context, the court may be prepared to give a degree of latitude because the Scheme is not driven by the free commercial choice of the transferor (see e.g. *Re Aviva Life and Pensions UK Limited* [2019] EWHC 312 (Ch) ("*Aviva*") at [86]).

The independent expert and his report

34. As is made clear by the Court of Appeal in *Prudential* (at [81]), the report on the terms of the scheme prepared by an independent expert, and which is required by section 109 of FSMA for every application under section 107, is a critical document to assist the court in the exercise of its jurisdiction to sanction under section 111. The independent expert must have the skills necessary to enable him to make a proper report and must be nominated or approved for the purpose by the appropriate regulator, in this case the PRA, which must also approve the form of the report.

35. In the present case, the independent expert approved by the PRA to make a report on the terms of the Scheme was Mr Philip Simpson, a principal of and consulting actuary at Milliman LLP. He prepared two reports, the first dated 1 July 2022, the form of which was approved by the PRA and a second supplementary report which was dated 3 October 2022. He also wrote to the court on 17 October 2022 to explain the steps he had taken to keep the position under review since his supplementary report in light of the turbulence suffered by the financial markets over the course of the days immediately prior to the hearing of the application. As with his reports, this letter has been seen and considered by the PRA and the FCA, who confirmed that they continued to not object to the Scheme.

36. As Mr Moore submitted, an independent expert is not in the position of an expert appointed by a party to litigation in the normal sense. His independence is repeatedly emphasised by the provisions of the PRA's statement of policy and is fortified by the PRA's involvement in the process of nomination and oversight. In the present case, Mr Simpson has wide experience of other Part VII transfers and his own understanding of his role, including his recognition that he owes his duty to the court, is explained in his report in a manner which left me in no doubt that he appreciated both the full extent of those duties and the significance of the role which he was called on to fulfil.

37. In my analysis of the views expressed by Mr Simpson in his report, I was required by the principles summarised in *Prudential* to interrogate the report for errors, obscurities or inadequate or defective reasoning. But I also recognised that I was not in a position to substitute any expertise I may have for his. As the Court of Appeal emphasised in *Prudential* the court should not depart from the conclusions in the report of the independent expert without significant and appropriate reasons for doing so.

38. Taken together, Mr Simpson's reports cover several hundred pages of analysis, which it is unnecessary for me to do more than summarise in outline. I agree with Mr Moore's description of them as both detailed and compelling. Although there are parts of both reports which are a dense read, that is wholly unsurprising, and I did not find any parts of them to suffer from obscurity or inadequate or defective reasoning. Mr Simpson concluded that the implementation of the Scheme would not have a material adverse effect on the security of the benefits under the transferring policies, the profile of risks to which the transferring policies are exposed, the protection offered by the regulatory regime that would apply to the transferring policies and the reasonable expectations of the transferring policyholders in respect of their benefits (including the level and standards of administration and service that would apply to them).

39. Mr Simpson also reached the same conclusions (in so far as applicable) in relation to the non-transferring policies, which is unsurprising in light of the fact that the impact of the Scheme on PLL's and RLL's existing solvency coverage ratios can properly be described as very small indeed. In the light of the size of the business transferred as compared to that retained by PLL and RLL, I simply note that Mr Simpson reached the conclusion that none of what is proposed has any material adverse effect on the non-transferring policyholders. I accept that conclusion as self-evidently correct.

40. As to the position of the transferring policyholders, Mr Simpson dealt with a number of specific issues to which I also had particular regard. They were described by Mr Moore as consequences of the Scheme and are important both because they reflect differences in the position of each transferring policyholder pre- and post-transfer and

because some of them were referred to by one or more of the small number of policyholders who expressed concerns about the Scheme.

41. The first of these related to the financial strength of PLAE in respect of which Mr Simpson's first report considered the figures as at 31 December 2021, while his supplementary report reassessed the position based on the figures as at 30 June 2022. This is obviously a critical question and involved a comparison of the PLL and RLL pre-Scheme solvency coverage ratios (164% and 1,229% respectively) with the pro-forma post-Scheme solvency coverage ratio of PLAE (set at 150% in accordance with the Capitalisation Requirement).

42. PLAE's proposed capital management policy provides for a solvency coverage ratio of 150%, which is therefore 50% in excess of the own funds it has to cover its regulated SCR. The SCR itself is set by Solvency II by reference to the capital required to be held to ensure continued solvency over a one-year trading timeframe with a likelihood of 99.5%. However, there is an obvious differential in the solvency coverage ratio of 150% derived from the Capital Requirement and the existing solvency coverage ratios of PLL and RLL I have set out above. At first blush this might be thought of itself to demonstrate that the transfers proposed would have an adverse effect on the position of transferring policyholders.

43. However, the evidence is that this would be to misunderstand the way in which an insurer's prudential capital requirements are calculated under Solvency II. They start with the quantification of BEL, by reference to what is expected to be required to pay all sums due over the life of a policy (not just over the course of one year). A risk margin is then added which means that, even before amounts are set aside to cover the SCR, there is high degree of practical protection to policyholders in terms of the assets a firm must hold. The SCR is then calculated on a rolling basis as the amount necessary to ensure that the insurer can withstand a 99.5% (or 1-in-200 year) stress event on its BEL and assets over the next year, and still remain able to pay its liabilities.

44. An insurer will then have its own capital policy, which dictates how much capital over and above the SCR it chooses to hold. A capital policy operates as an early warning system to enable management to take appropriate action to mitigate the risk that the SCR might be breached. Thus, the level of assets an insurer has to hold to meet policyholders' claims (in addition to assets matching the BEL) is determined by reference to three levels of protection: its capital policy, the SCR and the risk margin.

45. The effect of all this is that a relatively large shift in the surplus over the SCR is in fact a very small decrease in the probability of remaining solvent over the course of the following year, because a solvency cover ratio of 100% equates to a 99.5% probability of remaining solvent over a 1-year period: for a more detailed explanation see *The Prudential Assurance Company Limited* [2018] EWHC 3811 (Ch) at [45]–[47]. Furthermore, little weight can be given to the extent of any level over the SCR because (a) an insurance company is entitled to do as it pleases with any such excess (see *Re HSBC Life (UK) Limited* [2015] EWHC 2664 (Ch) at [46]) and there is no principled basis upon which to determine its appropriate amount (see *Re Rothesay Assurance Limited* [2016] EWHC 44 (Ch) at [33]–[39]).

46. For these reasons, I can understand why Mr Simpson was satisfied that reliance on the financial strength of PLAE if the Scheme were to be implemented would not lead to a

material adverse effect on the security of benefits under the policies to be transferred under the Scheme. For slightly different reasons I can also understand why he reached that conclusion having regard to the turbulence in the financial markets which I have already mentioned. As the capitalisation of PLAE is to be achieved by an undertaking from ReAssure Limited to procure a solvency coverage ratio of 150% as at the effective date, the recent turbulence has had a limited practical effect on the conclusions he expressed. Another way of looking at the same point is that there is no suggestion that the turbulence has affected the comparative positions of PLL and RLL on the one hand and PLAE on the other in an asymmetric manner. I was and remain satisfied that Mr Simpson's overall conclusion on PLAE's financial strength is reasonable and is one which I should accept and follow.

47. The second issue related to the reinsurance arrangements that I have already described. Mr Simpson has given a detailed description of how these arrangements will work and the security given by PLL and RLL for their implementation. They avoid the disadvantages of disaggregation and Mr Simpson has identified no reason why they should not work. It seemed to me that he was entitled to reach the conclusion that he did, and I could see no reason why their implementation in accordance with the terms of the Scheme will not be achieved as intended. In particular, I considered that they are structured in a way which ensures that, in economic terms, there is no material risk to the existing rights of with-profits and unit-linked policyholders the value of which are therefore likely to be preserved.

48. One particular aspect of the with-profits business which it is convenient to mention at this stage is that unlike in the UK, there is no requirement in Ireland for insurers to establish a with-profits committee or to appoint a with-profits actuary. However, the effect of the reinsurance arrangements is that the existing PLL with-profits committee will be required to consider issues relating to the PLL with-profits transferring business as if it were held directly within the relevant PLL with-profits fund. To that extent it will continue to be subject to with-profits committee oversight.

49. For all of these reasons, I agreed with Mr Simpson's conclusion that the reinsurance arrangements will not lead to a material adverse effect on the security of benefits under the policies to be transferred under the Scheme.

50. The third issue related to the fact that some but by no means all of the policies to be transferred by both PLL and RLL benefit from the UK's Financial Services Compensation Scheme ("FSCS"). There is no similar Irish compensation scheme for the types of policies held by the transferring policyholders. It follows that it is likely that policyholders with claims occurring on or after the effective date will not be covered by the FSCS. This is a point which has been raised by three of the five policyholders whose communications were treated by PLL and RLL as objections to the scheme and who have stated or at least implied that this is a reason why they are adversely affected by the Scheme.

51. Mr Simpson's conclusion on this issue was that, taking into account the capitalisation of PLAE and the requirements of the Irish regulatory regime that PLAE must comply with Solvency II, the likelihood of an insolvency of PLAE is remote. It therefore followed that the prospect of any transferring policyholder being in a position in which it may wish to call on a compensation scheme is equally remote. This then had to be set against the purpose of the proposed scheme which is to effect the transfer of business

from PLL and RLL to an EEA insurer in order to provide certainty, consistency and continuity in the provision of administration and benefits following Brexit. It is an inevitable consequence of the introduction of these benefits, driven as they are by Brexit, that the protection of the FSCS will no longer be available.

52. In my judgment, this is a reasonable conclusion for Mr Simpson to have reached and one with which in any event I agree. Furthermore, and against this background, I considered that Mr Simpson was justified in reaching the conclusion that the loss of FSCS protection would not lead to a material adverse effect on the security of benefits for the transferring policyholders: the likelihood of default is remote and the loss of FSCS protection is more than outweighed by the other benefits of the Scheme. The comparative exercise is one which the court is required to carry out when it adopts the approach mandated by the Court of Appeal's judgment in *Prudential* at [85] and in my judgment the balancing exercise carried out by Mr Simpson was both reasonable and correct.

53. Even if it is right to characterise this consequence as having some adverse effect on the position of the transferring policyholders, it cannot be regarded as real or significant (see *Prudential* at [83]). In so concluding I had in mind that this issue only arises because of the need to promulgate a scheme which has been forced upon PLL and RLL by external events, a conclusion which Snowden J reached when dealing with a similar issue in *Aviva* (see in particular at [57] to [62] and [86] and see also *Royal London* at [25] and [40] to [43]).

54. I should add that it is relevant on this point that Mr Simpson also considered and took into account the effect on the transferring policies of the changing regulatory regime from the UK to Ireland, as to which the CBI will become the regulator primarily responsible for conduct of business supervision instead of the FCA and for prudential regulation instead of the PRA. In both of his reports, Mr Simpson gave careful consideration to the two regimes and was satisfied that the changing regulatory regime would not have a material adverse effect on the transferring policyholders. In my view these conclusions were carefully explained and clearly justified by the evidence.

55. The fourth issue related to the loss by transferring policyholders of their right of access to FOS in relation to complaints after the Scheme becomes effective. I agree with Mr Moore that this change does not give rise to an adverse effect for policyholders at all for two reasons. The first relates to acts and omissions prior to the effective date. PLAE has agreed under the Scheme to be bound by the FCA rules, to abide by any ruling given by FOS and to give policyholders a direct right of action against PLAE. The second relates to acts and omissions after the effective date. The evidence is that there is no transferring policyholder of either PLL or RLL who would have been eligible to make a claim to the FOS, but who will not also be eligible to make a claim to the Irish equivalent, the Financial Services and Pensions Ombudsman ("FSPO").

56. There are some respects in which the complaints' systems differ, most obviously in the amount of any compensation that can be ordered. The FSPO may direct financial services providers to pay compensation of up to a maximum of €52,000 per annum where the subject of the complaint is an annuity, and a maximum of €500,000 for any other complaints. This is to be contrasted to the FOS where the compensation limit has changed over time but is now £355,000. However, Mr Simpson identified that there are less than 20 policies which would be adversely affected by having recourse to the

FSPO in Ireland rather than the FOS in the UK. As the services otherwise provided are broadly similar, he expressed himself satisfied that implementation of the Scheme would not have a material adverse effect on the rights of the PLL and RLL transferring policyholders in relation to their access to the services of an independent complaints service. Having particular regard to the *Prudential* judgment at [84], I agree.

57. I should add that Mr Moore pointed out that there is, in any event, a European network of alternative dispute resolution schemes, called FIN–NET, which experience suggests policyholders in fact prefer using. I agree that this fortifies the conclusion that the Scheme does not have a material adverse effect on policyholders' rights by reason of any material impairment of their access to an independent complaints service.

58. The fifth issue was that Mr Simpson also considered the effect of the Scheme on the reasonable expectations of the transferring policyholders in respect of their standards of service. He looked at issues of management, governance, administration and servicing and concluded that the Scheme would not have a material adverse effect on such matters. In very broad terms, the principal reason for this was that many of the existing service providers will continue to administer the transferring policies, while to the extent that there are changes, the existing service metrics will continue to apply. His report also explained how it is that the way in which PLAE will communicate and interact with its policyholders, including such matters as how premium will be paid and benefits will be received, will not be adversely affected by the Scheme. I am satisfied that the evidence supports the conclusions that he reached.

59. Finally, a question arises in relation to the sanctions imposed as a result of the Russian invasion of Ukraine. Approximately 250 policyholders hold units in funds that hold units in funds that have been suspended by their managers. The result of the suspensions is that ReAssure has suspended the funds and that will remain the case after the Scheme takes effect. The evidence is that there is no question of the policy transfers to be given effect by the Scheme being in breach of the sanctions regime and in my judgment, there is no basis for concluding that the existence and continuation of those suspensions means that the sanction of the Scheme will have had any material adverse effect on the affected policyholders.

<u>The position of the objecting policyholders</u>

60. As I have already mentioned there were a small number of policyholders who registered objections to the Scheme with either PLL or RLL. I was told that there were 368 responses from 21,636 communications, five of which were classified as objections. The principal issue related to the removal of access to the FSCS, which it is fair to characterise as an understandable concern. Nonetheless, for the reasons that I have given, it is clear to me that the FSCS issue does not mean that any of the transferring policyholders will suffer a material adverse effect or that it would otherwise be inappropriate to sanction the Scheme. The remaining objections were either specific concerns expressed by policyholders relating to their own individual positions in existing disputes they had with either PLL or RLL or a more general lack of understanding as to why it is necessary for the policies to be transferred out of the United Kingdom. The former are not relevant at all to the matters with which the court is concerned on this application for sanction and I have sought to explain the answer to

the latter in my summary of the commercial reasons, impelled by Brexit, which underpin the desirability of the transfers being made.

61. The only other issue that was raised by policyholders related to a concern expressed by one policyholder that he had had insufficient time to consider the transfer. In my view this complaint has not been established on the evidence. PLL and RLL gave adequate notice in accordance with the procedures normally adopted in relation to Part VII transfers and the order for directions was complied with. Furthermore, the FCA was satisfied that the way in which communications to policyholders were conducted did not give rise to objection and that those affected by the Scheme received sufficient information to enable them to understand their position. I agreed with that conclusion and did not consider that any of the issues raised by the objecting policyholders substantiated a conclusion that it was inappropriate to sanction the scheme.

Effectiveness of the Scheme

62. The final matter which relates to the exercise of the court's discretion is the important question of whether the court's order will have effect in the jurisdictions in which policyholders are resident. This is particularly significant where the governing law of the policy is not English or Irish. As David Richards J explained in *Sompo Japan Insurance Inc* [2007] EWHC 146 (Ch), the question for the court on this issue is whether its order will have real practical utility or achieve a substantial purpose (see at [26]).

63. In part, this is dealt with by a provision in the Scheme under which PLAE has agreed to be bound anywhere in the world, but the applicants have also taken advice on the position from lawyers in Germany, Sweden, Norway and Iceland (the position in Ireland and England being dealt with by the very sanction of the Scheme and the Irish Scheme in the two jurisdictions). Mr Moore has taken me through a summary of the advice that has been given. A number of questions were asked and answered by each lawyer, and in each instance the answer was that the courts of the relevant jurisdiction were likely to recognise the transfers given effect by the Scheme. In these circumstances, I am satisfied that the test expounded in *Sompo* is met and questions of international recognition provide no impediment to the sanction of the Scheme.

Conclusion

64. In the final analysis, the court must look at the position in the round, having regard to the considerations explained by the Court of Appeal in its judgment in *Prudential*. Having sought to adopt that approach, I was satisfied by the end of the hearing on 18 October 2022 that in all the circumstances the statutory requirements for sanction of the Scheme had been met and that this is a Scheme that I ought in my discretion to sanction. For those reasons I made an order sanctioning the Scheme accordingly.

65. I should add that in sanctioning the Scheme, I was also satisfied that it was appropriate to exercise the court's powers under section 112(1)(d) of FSMA to make orders with respect to such incidental, consequential and supplementary matters as were necessary

to secure that the Scheme is fully and effectively carried out. There was nothing in the orders sought which were out of the ordinary or otherwise require explanation in this judgment.