Case No: CR-2016-007725

Neutral Citation Number: [2017] EWHC 1439 (Ch)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CHANCERY DIVISION

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

Date: 15th June 2017

Before :

Mr Justice Warren

- -

In the Matter of Scottish Equitable Plc

- and –

In the Matter of Rothesay Life Plc

- -

Hearing dates: 15th June 2017

- -

JUDGMENT

Mr Justice Warren Thursday, 15th June 2017

(10.34 am)

Ruling by MR JUSTICE WARREN

Introduction:

1. This is an application by Part 8 claim, issued on 17th February 2017 by Scottish Equitable Plc, which I will call SE, and Rothesay Life Plc, which I will call RL, for an order under Section 111 of the Financial Services and Markets Act 2000, the FSMA, sanctioning a business transfer scheme, the Scheme, of the transfer to RL of a book of annuity policies of SE and for ancillary orders under Section 112.
2. I approved the Scheme on Tuesday of this week. I deliver this judgment today, Thursday, to give my reasons for that decision.
3. Mr Martin Moore QC appears for SE and RL. The regulators, the Prudential Regulation Authority and the Financial Conduct Authority, do not appear but have each filed, as is usual, preliminary and supplemental reports. Neither takes any objection to the Scheme.
4. I have received oral representations from two individuals. First, Mr Bethell-Jones, a policyholder who objects to the Scheme, and secondly, Miss Hutchins, who speaks on behalf her elderly father, another policyholder who objects to the Scheme. Miss Hutchins has sent me, a further written submission since the hearing to which Mr Moore has responded. Mr Bethell-Jones has also added some material in response to Mr Moore's response.
5. I have had my attention drawn to the objections of a number of other policyholders, including a Mr Bamford, who do not appear but who have asked that their objections be brought to the attention of the court. I had read all of the relevant correspondence and took account of the objections in reaching my conclusions.
6. Also Mr Crowfoot, Mr Newell and Mr Henderson have made submissions in writing, which I think will be covered in what I say about the other objections, although I will mention Mr Henderson expressly.
7. The claim is supported by the evidence of Mr Stephen McGee, who has filed three witness statements, the chief financial officer of SE, and of Antigone Loudiadis, who has filed two witness statements, she being the chief executive officer of RL.
8. The independent expert appointed for the purposes of this claim is Mr Nick Dumbreck FIA of Millimans. He is, I am satisfied, eminently qualified to act as an independent expert with a wealth of experience of schemes of this nature. He is fully aware of the importance of his role and of his responsibilities as a truly independent expert. He has produced a report dated 23rd February 2017, and a supplemental report dated 2nd June 2017 to update the former as near to the hearing as may be sensible.
9. I have read these two reports with care. I have also read with care two reports from SE's chief actuary and two reports from SE's with profits actuary and two reports from the chief actuary to RL.
10. The two regulators have each produced two reports, which again I have read, and neither now takes any objection to the Scheme, certain concerns initially made by the FCA having been addressed by SE and RL.

The Background:

11. The background is not contentious and I take much of it from Mr Moore's helpful skeleton argument.
12. SE is a wholly owned subsidiary of Aegon NV. SE's main focus is on its non-profit business. As at 31st December 2015, it comprised some 2.5 million policies with gross

reserves of £51 billion. It also maintains a much smaller with profits fund which is closed to new business and which, as at 31st December 2015, comprised about 114,000 policies with gross reserves of £5.3 billion.

13. As at 30th June 2016, its solvency capital requirement, SCR, cover was 142 per cent as is shown in paragraph 4.30 of the independent expert's first report. The SCR cover has been updated in the supplementary report which shows that as at 31st December 2016, SE's SCR cover was 151 per cent.
14. Aegon concluded that writing annuities was not part of the group's core business and, as a result, SE determined to exit the annuity business in order to focus on its workplace and retail platform and protection business. SE considered that the best option for this annuity business was to identify suitable and specialist annuity providers in the market. Following a competitive auction process, which included bids for the whole and part of the book, this led to the identification of RL and Legal & General Assurance Society, LGAS, for two books of annuities. SE identified RL as what it considers to be a suitable provider, having both the scale and experience to take on the book representing the transferring business.
15. That book comprises approximately 187,000 contracts, of which 183,000 are annuities and payments to individuals. The reserves are approximately £6.4 billion. The great majority of the policies proposed to be transferred, about 173,000, are allocated to SE's non-profit sub-fund and the balance is allocated to the with-profits sub-fund. The latter reflect policies where the annuities have commenced payment and no longer share in profits or losses.
16. At 30th September 2016, RL had 51 bulk purchase annuities where a Scheme trustee purchased for the benefit of its members a policy to enable it to meet its obligations to the Scheme members whose number in aggregate comprised many hundreds of thousands of individuals and approximately 63,000 individual policies holders with individual contracts.
17. As at 30th June 2016, its assets were £23.8 billion and liabilities £21.1 billion and its SCR cover was 162 per cent as shown by paragraph 4.80 of the independent expert's report. The SCR cover has been updated in the supplementary report which shows that at 31st December 2016, RL's SCR cover was 177 per cent. In addition, the board of RL approved a voluntary capital policy which required RL to maintain a level of capital between 130 per cent and 150 per cent of its SCR, which target it currently exceeds.
18. SE and RL entered into a series of annuity reinsurance agreements and a business transfer agreement on 11th April 2016, as amended and supplemented (I will refer to them as the reinsurance agreements) which has delineated the annuities to be transferred, some of the objecting policyholders having something to say about this process to which I will return.
19. Under the reinsurance agreements, assets to a value of about £7 billion to back the liabilities have been passed from SE to RL that are held in separate collateral accounts with security arrangements, such that the assets would be available to SE to cover termination amounts due from RL to SE in relation to reinsurance arrangements. It can be seen therefore that the economic risk and reward relating to the transferring business has already transferred to RL and the Scheme will align the legal position to that economic reality provided that RL remains solvent. SE remains of course liable to policyholders until the Scheme has taken effect. Once it does take effect, the collateral account and associated security arrangements will fall away and RL will take full control of the assets.
20. At the time of entering into the reinsurance agreements, the parties entered into a supplementary policies option deed which provided an option for SE to add additional policies to the existing reinsurance arrangements subject to a premium being agreed. This

option was exercised on 16th March 2017 which resulted in an additional 3,100 policies having been added to the reinsurance agreements which will form part of the transferring policies under the Scheme.

21. SE administers and makes payments under the policies that are proposed to be transferred, except for about 5,000-odd which are outsourced. As part of the administration arrangements, SE maintains funding accounts beneficially held in its name with RBS from which to effect payments to policyholders. These were funded by monthly reinsurance advance payments from RL.
22. On the effective date of the Scheme, which I have approved, the cash equal to be the opening balances on the funding accounts will be transferred under the Scheme from SE to RL. It is intended that the administration of the majority of the transferring policies that are currently undertaken by SE will be outsourced by RL to Capita Employee Benefits Limited and it is intended that the buy-out policies transferring from the with-profits sub-fund will be administered by another provider, JLT, with which RL already has a relationship.
23. I should mention another scheme Part VII FSMA under which part of the business was transferred from Zurich Assurance Limited to RL. That had not taken place when the independent actuary gave his first report, and he expressed his views on the alternative bases that the ZAL scheme did and did not go through.
24. There is need to obtain court approval in Jersey and Guernsey to transfer some of the policies which are subject to the jurisdiction of those courts and sanctions hearings are fixed for those later this month. If sanction is not obtained, those policies will continue to be reinsured under the reinsurance agreements until some alternative means of transfer have been identified.

<u>The Scheme:</u>

25. The Scheme itself is not particularly complex. Its final form takes account of the concerns of the regulators. In outline its structure is as follows: clauses 1 and 2 contain the definitions and introduction. Clause 1 identifies the business and defines the assets and liabilities to be transferred to RL. The conventional concepts of residual assets and residual liabilities are included to deal with cases where there is some difficulty with the transferring, in which case they transfer on a subsequent transfer date once the impediment has been overcome although the parties do not anticipate that there will be any such impediments.
26. The conventional concept of excluded policies has also been included to deal with the possibility, now only relevant to Jersey or Guernsey, that the relevant court may refuse consent to the transfer.
27. Clauses 3 to 10 deal with the actual transfer of the business. They contain conventional provisions for the continuity of the business and other matters. They also contain the necessary mechanics to ensure that had there been any excluded policies or residual assets or residual liabilities, the economic position would be as if they had been transferred.
28. Clauses 11 to 14 contain miscellaneous provisions. Clause 11 provides for the Scheme to become effective on 30th June 2017, at one minute past midnight. The rest of the section sets out various miscellaneous matters, such as modifications, data protection, costs, third party rights and governing law.

<u>Policyholder Protection:</u>

29. There are four layers of protection for policyholders in relation to business transfers. First, there are the regulators who have general supervisory functions. They have involvement in the Part VII process through the appointment of the independent expert and the structure of his report. They have involvement in the production of their own

reports. They have the entitlement to appear in this court, although they have not exercised that right in this case. And the Financial Conduct Authority has an involvement in the communications exercise and the objectives of the Scheme.

30. The second layer is the independent expert who is charged with assessing the application. In the present case, as I have said, Mr Dumbreck is hugely experienced and has produced a clear and careful first report and a helpful, clear and careful supplemental report. He understands and accepts fully his independence and his duty to the court.
31. The third level of protection is the communication programme, including a directions hearing and appropriate waivers which can be obtained for good reason, a process which has been properly gone through in this case.
32. The final layer of protection is the approval of the court, taking account of all the objections which are raised following the communication exercise.

Preliminary Issues:

33. Before turning to my function and the approval of the court, there are two preliminary issues to deal with.
34. The first is Mr Bamford's contention that the proposed transfer is not the transfer of a business at all so that the case is not within Part VII so that I have no jurisdiction to approve the Scheme.
35. The second is Miss Hutchins' argument that the scheme breaches her father's human rights with an infringement of the Human Rights Act 1998.
36. As to Mr Bamford's lack of business point, sections 105 and 111 allow for the transfer of an insurance business. Mr Bamford submits that the transfer of the relevant book of annuities under the Scheme is not the transfer of a business or part of a business within Section 111. This is because the whole of that book has been reinsured with RL so that, as he thinks arguable, the Scheme deals only with the transfer of some assets which previously formed assets of one of SE's businesses, and the assumption by RL of certain liabilities that arose in the course of a previous business of SE. If that is right, it is a surprising result because it would mean that the reinsurance effected with RE was itself a business transfer and therefore a breach of Section 104 would have been taken place.
37. There is nothing in my view in this argument, nor correspondingly is there concern about any breach of Section 104.
38. The concept of an insurance business transfer scheme is, as Mr Moore submits, very wide and flexible and there is a very limited minimum content. In that context, he has referred me to Save & Prosper Pensions Limited v Prudential Retirement Income Limited [2007] CSOH 205 where a transfer by way of the Scheme of only certain rights and obligations under a policy was sanctioned, and he has referred to Re Friends' Provident Life Office [2000] 2 BCLC 203 which concerned a transfer of a single reinsurance policy by a reinsurer back to the reinsured, which has exactly the same commercial effect as a surrender and was in the scope of an insurance business transfer scheme.
39. The essence of Mr Bamford's objection, as correctly identified by Mr Moore, is that because the insurance risk has been ceded to a reinsurer and an appropriate premium calculated by reference to the reserves has been paid, SE has no risk and reward in either annuitants living longer than projected or the assets under-performing the anticipated liabilities or vice versa.
40. I agree with him when he says that in general terms this is wrong, because there is nothing in Section 105(1) which requires the business in question to be one which exposes the transferor to risk or reward. The word "business" takes its meaning from its context. Part VII would not be a very effective provision if the only business which could be transferred was one which the transferor had not reinsured. Equally, the requirement to

notify outward reinsurers under regulation 3(2)(c) of the Transfer Regulations would be otiose.

41. In any event, the argument can be seen to be misplaced when one remembers that SE, as with any other reinsured, received the original premium from and remains primarily liable to the policyholder. There is no legal nexus between the policyholder and the reinsurer.
42. The argument fails also to acknowledge that although the reinsurance has substituted the credit risk on RL for the longevity risk and primary market risk arising from the transferring business, that credit risk reflects an amalgam of RL's own longevity and market risk. SE remains liable to the policyholders and the risk that it will not be able to pay the policyholders lies in the credit risk it takes on RL.
43. As if that wasn't enough, SE is still paying the policyholders and administering at its cost most of the annuities which comprise the transferring business, which administration will on the effective date be undertaken by or on behalf of RL.
44. It is my judgment that last factor alone is sufficient to ensure that the subject matter of the Scheme is properly a business.
45. Miss Hutchins' point relates to the Human Rights Act 1998. Her first point is that the Scheme interferes with her father's property rights which are protected under Article 1 of the first Protocol to the European Convention on Human Rights, that is the right to peaceful enjoyment of possessions. This argument has to rely on the proposition that Part VII is not compliant with A1P1.
46. The decision of Mr Justice David Richards in *ING Direct BV* on 20th February 2013 at paragraphs 27 and following shows that proposition to be incorrect. There is nothing I can usefully add to what he says there, including his reliance on the decision of Mr Justice Lloyd in *Re Equitable Life Assurance Society* [2002] 2 BCLC 510. I wholly agree with his conclusion, and, even if I had some doubt about it, which I do not, I should follow it.
47. Of course I have to be satisfied that the Scheme before me is fair to policyholders in the sense which the authorities indicate and to which I will come. If it is not fair in that sense, I would not have approved it. But if it is fair, as I considered it was, then the HRA point does not assist Mr Hutchins.
48. Miss Hutchins' second point relates to the service of the application on her father. Although she raises the issue under the heading Human Rights Act 1998, it is really an issue about compliance with domestic requirements. What Miss Hutchins says is that her father received inadequate notice of the Scheme proposal. She suggested there was a hearing in April 2016 and that her father only received notice of the proposed scheme on 4th May 2017. Notwithstanding that mailing was carried out in between 10th March and 30th April, it is in fact quite possible that Mr Hutchins did not receive the mailing until 4th May as I understand he lives out of the country. But even if that is so, he received it in very good time for the hearing before me and well over the six weeks which the FCA considers appropriate.
49. There was in fact no hearing in April 2016. Possibly Mr Hutchins, as Mr Moore speculates, is confusing the announcement of the inception of the reinsurance with the Scheme. In any case, I do not consider there is anything in this notice point.
50. Whilst on the matter of notice, I should note that one objector, Mr Henderson, asked in a letter to the court that the hearing be adjourned. He had objected to the Scheme in a letter to SE dated 21st March. It was not until 9th June, last Friday, that he says he received the letter dated 6th June from the chief financial officer of SE informing him of the imminent hearing on 12th June, enclosing a copy of Mr Dumbreck's second report. He was unable to attend court on that day.

51. He refers to paragraph 4.14 of Mr Dumbreck's report where he points out that the PRA's policy is to require a period of not less than six weeks for making representation to the court. That is true (although the reference ought to be the FCA), but the PRA's statement of policy and Mr Dumbreck's report are clearly referring to the first report, not to a supplementary report by way of confirmation and update. The whole point of the supplemental report is precisely to give the updated position close to the sanctions hearing and not six weeks or more before it.
52. I am not going to read it into this judgment, but Mr Dumbreck's statement at 4.14 must be read in the context of what he says in 4.15 as well.
53. I declined to adjourn the hearing and these are my reasons. First, Mr Henderson did make some observations. He had the weekend to think about the matters. This does not form part of my reasoning but I note that he is a QC and I dare say he is experienced in preparing complex matters in short order.
54. Secondly, the supplemental report did not raise matters of any significance which could not have been raised in relation to the first report.
55. Thirdly, although Mr Henderson did not receive the report until 9th June, it was available on the website on 5th June. Anyone interested, particularly an objector, could reasonably be expected to monitor the website in the light of the impending hearing which had itself been fixed and the date notified on the website in March. The March circular itself to policyholders stated that the court hearing would be on 12th June.

General Principles Relating to Scheme:

56. Any scheme of this nature is instigated by the commercial parties concerned, not by the policyholders. Parliament has seen fit to introduce legislation providing for business transfers, one statutory result of which is that the contractual obligations of the transferor are extinguished, with corresponding obligations being imposed on the transferee. Sometimes different policyholders are treated in different ways, in which case a balance has to be struck between their interests, and in all cases the policyholders must be treated properly. The four layers of protection which I have mentioned are there to ensure that policyholders are treated properly. But policyholders are not given a veto over what the commercial parties wish to do. Instead the appropriate balance has to be struck between the interests of the policyholders on the one hand and the commercial parties on the other hand, just as it has to be struck between different groups of policyholders amongst themselves.
57. The approach of the court to its functions in providing the fourth layer of protection is now well-established, that fourth layer being found in the words of Section 111(3):
    > "The court must consider that, in all the circumstances of the case, it is appropriate to sanction the Scheme."
58. The statutory word is “appropriate” and not “fair”, let alone what is viewed as subjectively fair by policyholders.
59. In this context, the court has followed the approach taken by the court to the jurisdiction previously exercised under schedule 2C to the Insurance Companies Act 1982, as to which I would refer to the decision of Mr Justice Evans-Lombe in *Allied Dunbar Assurance Plc* [2005] EWHC 28.
60. The need for court approval of transfers of long-term business is longstanding. The principles to which the court has regardin deciding whether to exercise its discretion under schedule 2C was set out in the decision of Mr Justice Hoffmann in *Re London Life Association Limited* on 21st February 1989 (unreported) and again by Mr Justice Evans-Lombe in *Re Axa Equity & Law Life Assurance Society plc and Axa Sun Life plc* [2001] 1

All ER (Comm) 1010. Axa has been followed consistently by judges of this division. In *Re London Life* Hoffman J said:

> "Although the statutory discretion is unfettered, it must be exercised according to principles which give due recognition to the commercial judgment entrusted by the company's constitution to its board. The court in my judgment is concerned in the first place with whether a policyholder, employee or other person would be 'adversely affected' by the scheme in the sense that it appears likely to leave him worse off than if there had been no scheme. It does not however follow that any scheme which leaves someone adversely affected must be rejected. For example, as we shall see, one scheme which might have been adopted in this case would have adversely affected many London Life's employees because they would have become redundant. But such a scheme might nevertheless have been confirmed by the court. In the end the question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected. But the court does not have to be satisfied that no better scheme could have been devised. A board might have a choice of several possible schemes, none of which, taken as a whole, could be regarded as unfair. Some policyholders might prefer one such scheme and some might think they would be better off with another. But the choice is in my judgment a matter for the board."

61. In *Axa*, Mr Justice Evans-Lombe applied Mr Justice Hoffmann's decision deriving eight principles which he considered governed the approach of the court to applications for the sanction of transfers of long-term business. The eight principles were set out at pages 1011 and 1012 as follows:

> "(1) The 1982 Act confers an absolute discretion on the court whether or not to sanction a scheme but this is a discretion which must be exercised by giving due recognition to the commercial judgment entrusted by the company's constitution to its directors.
>
> "(2) The court is concerned whether a policyholder, employee or other interested person or any group of them will be adversely affected by the scheme.
>
> "(3) This is primarily a matter of actuarial judgment involving a comparison of the security and reasonable expectations of policyholders without the scheme with what would be the result if the scheme were implemented. For the purpose of this comparison the 1982 Act assigns an important role to the independent actuary to whose report the court will give close attention.
>
> "(4) The FSA by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on whether policyholders are likely to be adversely affected. Again the court will pay close attention to any views expressed by the FSA.
>
> "(5) That individual policyholders or groups of policyholders may be adversely affected does not mean that the scheme has to be rejected by the court. The fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected.
>
> "(6) It is not the function of the court to produce what, in its view, is the best possible scheme. As between different schemes, all of which the court may deem fair, it is the company's directors' choice which to pursue.
>
> "(7) Under the same principle the details of the scheme are not a matter for the court provided that the scheme as a whole is found to be fair. Thus the court will not amend the scheme because it thinks that individual provisions could be improved upon.

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

62. The sixth principle reiterates that it is not the court's function to produce the best possible scheme. It is for the company directors to choose, as between different schemes, which to pursue provided that the court may deem them fair. And a similar point was made in principle 7.
63. Care must be taken over the use of the word "fair". This is not the subjective view of a policyholder or even of the judge. An objective view must be formed, a view reached against the objective standards and the factors appropriate to take into account. To take an extreme example, a scheme would not be unfair because it transferred business from a Scottish company to an English company even though a particular policyholder selected the company in the first place precisely because it was Scottish rather than English.
64. The point is made by Mr Justice David Richards in *Royal Sun Alliance Insurance plc* [2008] EWHC 3436 (CH) at paragraph 7, where he says this:

"7. So far as the first part of that citation is concerned, in my view it is applicable to the transfer of long-term business, in particular the transfer of with-profits business. That was the issue in the London Life case. The emphasis is there on fairness as between the interests of different classes of persons and whether the terms of the scheme could have been improved. In my judgment, fairness is not usually, if ever, an issue which arises in relation to the transfer of general business. As I have said, the concern of general insurance policyholders is whether their claims will be paid. That is not a question of fairness; it is a question of ensuring that the transferee is in a financial position to meet those claims as and when they are made. In contrast, fairness is at the heart of the conduct of with-profits business in circumstances where the insurer, through its own appointed actuary, has to make judgments as to how profits are to be allocated, the extent to which there are to be bonuses, whether on an annual or terminal basis, and judging the interests of different groups of policyholders, as well as the company and its shareholders."

65. The point of that paragraph is that in a scheme such as the one before me, the central concern is not one of fairness, but is a question of ensuring that the transferee is in a financial position to meet its obligations.

<u>The Expert's Reports:</u>

66. I turn now to the independent expert's report. I do not propose to go through the reports in detail or indeed to say much at all, other than in relation to the independent expert's conclusions which I will come to. Before I do that, I note that the independent expert has a wide role which was examined in *Re Eagle Star Insurance Company Limited* [2006] EWHC 1850 (CH). Of course the court retains a discretion to sanction the Scheme and the independent expert's report does not trump every objection. But nonetheless, the conclusions of the report are clearly central and, as Mr Moore submits, ordinarily a decisive matter.
67. This is consistent with the judgment of Mr Justice Briggs in *Re Pearl Assurance (Unit Linked Pensions) Limited* [2006] EWHC 2291 (CH) at paragraph 6:

"6. Notwithstanding that detailed perusal of a proposed Scheme both by an independent expert and by the FSA are conditions precedent to the exercise of the

court's discretion to sanction it, the discretion remains nonetheless one of real importance, not to be exercised in any sense by way of rubber stamp. The principles to be applied by the court in considering whether to exercise its discretion are well settled. They were first set out by Hoffmann J (as he then was) in the unreported decision Re: The London Life Association Limited and others on 21st February 1989, albeit then under section 49 of the Insurance Companies Act 1982, and more recently reaffirmed by Evans-Lombe J in Re: Axa Equity and Law Life Assurance Society plc and another [2001] 2 BCLC 447, in particular at paragraph 6 of his judgment. The relevant principles are concisely summarised in the following passage from the judgment of Mr Justice Rimer in Re: Hill Samuel Life Assurance Limited [1998] 3 All ER 176, at 177:

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

68. Mr Dumbreck has produced a detailed and, to my mind, compelling report in which he examines the effects of the scheme on the security of the policyholders concerned, and he has produced a supplementary report which takes account of information which was not available at the time of the original report.
69. His overall conclusion is set out in section 10 of his first report which he confirms in his supplemental report, and I should certainly read that out.

    10.1:

    "I am satisfied that the implementation of the Scheme will not have a material adverse effect on:

    "1. The security of benefits of the policyholders of SE and Rothesay; or

    2. The reasonable benefit or expectation of the policyholders of SE and Rothesay or there will be no change in the policy terms and the conditions of the transferring policyholders as a result of the Scheme;

    3. The service, standards and governance applicable to the policyholders of SE and Rothesay."

    10.2:

    "I am satisfied that the Scheme is equitable to all classes and generations of Rothesay and SE policyholders."

    10.3:

    "My conclusions remain unchanged whether or not the LGAS scheme and/or the Zurich scheme is sanctioned."
70. In reaching that conclusion, Mr Dumbreck has addressed a number of aspects on which I shall touch briefly. As I said in my introductory remarks, this judgment and indeed the Scheme cannot really be assessed properly without a detailed reading of the expert's reports. It is obviously absurd for me to address it in very great detail in this judgment but, as I have said, I have read it and I shall just make some summary observations.
71. The structure of the report is that in section 3 he gives a summary of the current prudential capital regulatory and conduct regime, in section 4 he gives an outline of the business and financial conditions of SE and RL, which I have mentioned earlier in this judgment.
72. In section 6 he considers the effect of the Scheme on the transferring policyholders of SE. In relation to security, he notes that:

"SE and RL each have slightly different methods of calculating their technical provisions. This includes an increase in absolute levels of excess assets over SCR from 142 per cent in SE to 162 per cent in RL."

73. Mr Dumbreck considers the relative capital policies of SE and RL and he concludes that they are of similar strength. He considers the differences in risk profile, noting that the solvency 2 calculations already take into account the risk each company is exposed to. Overall, he does not consider that the change in risk profile to have a material effect on benefit security.
74. I just interpose at this point, because it is a convenient time at which to do so, that one of the objections is that Mr Dumbreck has not been comparing like-with-like and he should conduct his assessment of the financial strength using the same criteria for each of SE and RL. But that goes against the whole grain of the new regulatory requirements which is a much more bespoke rather than one-size-fits-all approach to the capital requirements for providers. I am quite satisfied that that particular objection has no force in it.
75. In relation to reasonable expectation, there is no change since the terms of the annuities remain unchanged. And as regards service standards, while he reserves final comments for the supplemental report, he is satisfied that they will be in no worse a position.
76. In this context he sees reasonable expectations in this way, as appears from paragraph 6.51 of his report:
"The transferring SE policies are all non-profit in payment or deferred annuities and therefore policyholders' reasonable expectations are respect of their policies are principally that:
    1. “They received their income as guaranteed under the policy or the date specified from the point of purchase;
    2. The administration, management and governance of the policies are in line with the contractual terms under the policies; and
    3. The standards of service are at least as good as those they currently receive."
77. In section 7 he considers the effect of the Scheme on the non-transferring policyholders of SE. He notes that the LGAS scheme, if sanctioned, will result in SCR cover improving to 159 per cent.
78. In section 8 he considers the effect of the Scheme upon existing policyholders of RL, and I don't need to go into the detail of that.
79. In section 9 he considers a miscellany of points, including communications plans of the parties and nothing turns on that for current purposes.
80. Mr Dumbreck prepared a supplemental report in which he takes account of the additional small number of policies to be transferred and the funding arrangements internal to SE to effect their inclusion in the reinsurance agreements. He gives the relevant SCR ratios on the basis of the figures to 31st December 2016.
81. In section 4 he carefully goes through each category of objection received by SE and gives his views on the issues raised by or on behalf of the relevant policyholders. He confirms that they do not, in his view, raise any issues not considered in the work leading to the initial report and he is satisfied that his conclusions in his report remain valid.
82. In section 5 he deals with a miscellany of points including revisiting service standards, with which he is satisfied, and certain tax impacts, and he is satisfied that they have been appropriately dealt with.
83. I will deal with those objections myself in due course.
84. Finally, in section 6 he confirms the conclusions in his report at section 10 in the same terms.

<u>Technical Aspects:</u>

85. I am satisfied that the technical aspects of the application have been properly dealt with. Notification has been given to policyholders and reinsurers, the documents have been made available as required by the regulations and regulators, necessary authorisations have been obtained, certificates from the regulators and the EEA regulators have been obtained or treated as no objections having been raised.

Objections:

86. The only matters standing in the way of approval are the objections articulated by the objectors. They will, I hope, forgive me if I do not address each and every one of them individually since their complaints all fall into one of a number of categories.
87. Mr Dumbreck has identified the complaints in his supplemental report. Notwithstanding the objections, the PRA and the FCA continue to raise no objections to the Scheme.
88. The objections are found in Mr Dumbreck's second report at section 4 where he deals with them at 4.5 to 4.24, in the regulators' reports for the PRA, see the section beginning at paragraph 22 incorporating annex 2 to the report, and for the FCA. See paragraphs 35 to 37 and the annex to that report.
89. I find the observations of Mr Dumbreck and the regulators of great force. The question for me is whether the objections, and in particular what has been said to me by Mr Bethell-Jones and Miss Hutchins, and to some extent the helpful observation of Mr Henderson, cause me to reach the conclusion that the sanction of the Scheme ought to be refused.
90. It is difficult for the purposes for this judgment sensibly to summarise the contents of Mr Dumbreck's report in relation to these objections. That is one of the main reasons why I said that it is actually very necessary to have his report to hand when considering the objections. I am, of course, not going to ask anyone to incorporate that part of his report into this judgment, but equally I see no point in attempting to precis what he has said in those paragraphs. As I have said, I consider that he has identified the class of objections accurately, and subject to anything that Mr Bethell-Jones, Miss Hutchins and Mr Henderson say, I consider that he has dealt with all those objections properly. The same, I can say, goes for the reports of the regulators.
91. What I am saying really is that I have attached considerable weight to their respective observations, and just as I have read the objectors' objections I have read the responses to those objections.
92. So I now turn to consider Mr Bethell-Jones and Miss Hutchins in turn. I received Mr Bethell-Jones' submissions only at the hearing, and I want to emphasise that this was through no fault of his. I rose to read it. He now considers this was a rushed exercise and slightly unsatisfactory. It may have been, but I have since the hearing read his submissions carefully, and I also of course read my own note of what he said to me orally.
93. In his pithy written submissions he identifies in essence his three objections in this way:
" A - I do not like Rothesay. I do not want to have anything to do with Rothesay. I believe that Rothesay will pursue policies to maximise their profit and the profits of their shareholders without proper regard for policyholders like me.
B - SE/Aegon have entered into these arrangements with Rothesay with no regard for my interests as a policyholder. Policyholders had not been asked to consent, let alone told before the actual economic deal was done. The money passed to Rothesay in April 2016 but the policyholders were not told, let alone asked, and they were given no choice.
C - The Scheme is a stitch-up. The court has effectively been presented with a fait accompli. It will be told that if it does not sanction the Scheme well, frankly, it makes no difference. If the law requires those transferring the insurance business to inform the

policyholders and obtain the sanction of the court before the transfer takes place, the law has been made a mockery."

94. He develops each of those complaints in his written submission, and he made equally pithy oral submissions to me which I do not think added significantly to the message which is given in his written submission.
95. In relation to the first complaint, "I do not like Rothesay", the general complaints are made about Goldman Sachs' business ethics. Goldman Sachs is a shareholder in RL but it is only a minority shareholder. The actual shareholdings appear in Mr Dumbreck's first report at paragraph 4.65:
"Rothesay is a subsidiary of Rothesay HoldCo, which in turn is owned by Goldman Sachs (32.7 per cent), the Blackstone Group LP (26.5 per cent), the Government of Singapore Investment Corporation (26.5 per cent), Mass Mutual Financial Group (6.5 per cent), and Management Employment and Elian Employee Benefit Trustees Limited (7.8 per cent)."
96. Mass Mutual is a large insurance company in Massachusetts. Management Employment and Elian Employee Benefits Trust Limited I know nothing about but its name suggests it might be concerned with benefits for employees.
97. The board of RL also has, it should also be noted, a majority of independent directors.
98. I simply cannot take account of unsubstantiated allegations about Goldman Sachs which, in any case, is only a minority shareholder. The behaviour of the shareholders would be mere speculation on my part and I have no more reason to think that the shareholders would act to the detriment of RL so as to put at greater risk its policyholders than Aegon would under the existing structure. As I have said, this would be pure speculation on my part, and one might speculate also that that sort of behaviour by a company with independent directors, of which Mass Mutual is a shareholder, is unlikely in the extreme.
99. With respect to Mr Bethell-Jones, there is no foundation for the suggestion that SE -- this is his point B -- have not paid regard to the interests of policyholders. Clearly they have, since they have produced a scheme which the independent expert commends and to which the regulators do not object. RL was selected as a bidder in the process for the acquisition of this particular book of business precisely because SE saw it as a suitable acquirer. It is irrelevant to the process of the court, in my judgment, that policyholders were not consulted before the reinsurance contract was effected.
100. As to the third point, to describe the matter as a "stitch-up", apart from being unnecessarily pejorative, is unfair. The fact of the reinsurance makes no difference to the exercise of my discretion in my judgment. The independent actuary has addressed the position on the alternative basis taking the reinsurance together with the Scheme, concludes that this would have presented an even more compelling picture, as to which see paragraph 9.14 of his first report.
101. I find it difficult in any case to see how it would be possible for the court to decline to approve the Scheme, starting from where I do, if treating notionally the reinsurance as part of a scheme for which sanction was sought it would have been appropriate to approve that notional scheme. As to that, Mr Dumbreck's expert opinion is there is no material detriment to policyholders on that alternative basis.
102. Mr Bethell-Jones makes a further point that the scheme is not fair. The focus of this submission is that the policyholders were given no choice. 99 per cent of them may have been happy to go to RL, but for a person like him who does not want to go to RL there should, he submits, have been a choice to allow him to transfer into a SIPP. He says he should be allowed to put his money back where he wants.

103. The problem with this approach is that it is not his money at all. As a result of his contributions, his premiums, he has become entitled to a stream of income from SE's general resources, in relation to which SE is exposed to a longevity risk. If, which I do not think is the case, Mr Bethell-Jones were to have a right as against SE to take a transfer value to a SIPP or another provider and even assuming, which I don't think they do, that Inland Revenue rules permit this, that is not a right he has sought to exercise. And since the policy terms continue, any such right, if it exists, is exercisable against RL as much as against SE today. I do not perceive the Scheme as unfair to Mr Bethell-Jones, save in the subjective sense of his complaint A.

104. Nor does the Scheme make a mockery of Part VII as is suggested by Mr Bethnall-Jones, and as Mr Bamford also suggests. The reinsurance may have shifted the economic reality but SE remains contractually liable to the policyholders and carries the risk of RL's default, just as it carries the risk of the collapse of a particular investment which it has made.

105. The transfer has a real legal consequence, and Part VI is not in any sense made a mockery of, nor is the court's discretion to approve the Scheme made a mockery of.

106. The mere effecting of reinsurance is not a transfer of business. Suppose that this reinsurance had been with a provider whose financial strength was not comparable with that of RL. Suppose, nonetheless, that a business transfer to such a company was desired but that no independent expert could be found who would give it the go-ahead. It could still be said that the economic risk had been transferred, but the Scheme could not be promulgated because the requirements of Part VI would not be fulfilled. It does not follow that where, in contract, the transferee *is* sufficiently strong for an independent expert to support, and for the court to approve the Scheme, that Part VII is made a mockery of simply because there has been prior reinsurance.

107. The last point made by Mr Bethell-Jones which I want to deal with is, and is a point also made by Mr Henderson, is that policyholders clearly are worse off as a result of the Scheme. At present they have the covenant of Aegon SE and the benefit of the reinsurance from RL, whereas after the transfer SE's covenant will disappear. That is slightly simplistic. Policyholders have no claim against RL under the reinsurance. The reinsurance is a contract which covers SE's own liabilities to its policyholders. Were SE to be unable to meet its liabilities, it is not necessarily the case that the reinsurance payments would be earmarked for these particular policyholders transferring to RL. Further, the reinsurance was a preliminary step in the preparation for the Scheme, so that from a commercial and economic perspective they can be seen as one.

108. These points do not, of themselves, meet the argument, I appreciate, but they do demonstrate how SE is conducting and is intending to conduct its business. It is entitled, in conducting its business, to proceed as it considers commercially sensible and responsible. That includes promoting this Scheme. It is not a requirement of the Scheme that a policyholder must, in all respects, be in at least as good a position as without the Scheme. In the present case, the independent expert is of the view that there would be no material detriment to policyholders and the regulators have raised no objection.

109. If I am satisfied, as I am, that there is no reason to doubt the independent expert's report, or to think that the regulators have overlooked something, this is not a case where the point I am now addressing should cause me to refuse to approve the Scheme.

110. In a recent letter to the court, Mr Bethell-Jones has suggested that he should be allowed to commute his pension or to transfer a fund to a SIPP. But as is pointed out, the Revenue will not allow commutation except in trivial amounts, which this is not, and he cannot transfer any fund to a SIPP.

111. So far as transferring to another provider is concerned, that is a matter for negotiation between him and the alternative provider to make use of any surrender value that RL, as it will be, is willing to provide.

112. There is a practical problem. If I had power, which I doubt that I do, and if I were to exercise that power in favour of Mr Bethell-Jones' proposal, it would be quite improper to make it tailor-made for him and it would have to be offered to all policyholders as a matter of fairness.

113. There has been no concrete proposal made by him, he simply asks SE to come up with a solution for him. I do not consider that SE is under any duty to do that. This does not provide a justification for me not to approve the Scheme without qualification.

114. Miss Hutchins makes a number of points, I have dealt with most of them either directly by reference to her own submissions or indirectly in my consideration Mr Bethell-Jones' points. I add these comments, however. Miss Hutchins emphasises the unfairness, as she sees it, of compelling her elderly father to transfer to a new company from the venerable SE which he deliberately chose. He wants to be given a choice, in particular to transfer to LGAS rather than to RL.

115. There are two points to make. Firstly, the venerable position of SE is not, I am afraid, of itself a relevant factor. Even venerable institutions can fail as those who work in this area of the law are well aware. In any case, SE is part of a group, about the age and venerability of which I have no idea. So the point, if it had any force, is not made good.

116. Secondly, a newish body, that is to say, RL, is not to be regarded as an unsuitable provider simply because it is new otherwise we could never have new entrants into the market for transfers. The question is not its age but its financial strength, record and expectations. As to this, the independent expert and the regulators are clearly satisfied about its financial strength, there is no criticism made of its record, and I have no reason to think that it will not be properly and prudently managed into the future.

117. The second point is to reiterate Mr Bethell-Jones' point that there is no choice. In particular, Miss Hutchins sees no reason why her father should not be able to transfer to LGAS rather than to RL. I have, in effect, dealt with this point already in addressing Mr Bethell-Jones' submissions. I cannot in any case compel LGAS to receive Mr Hutchins' policy. The books to be transferred to the two transferees are distinct and the commercial arrangements between SE and the two acquirers reflects the distinct nature of the two books. It is not open to me to qualify the Scheme by directing Mr Hutchins' policy to go to LGAS rather than to RL although it is open for him to attempt to negotiate that end position.

Conclusion:

118. When approving the Scheme on Tuesday, I did not consider that the complaints made by all the objectors provided sufficient reason to decline to approve the Scheme or to modify it in any way when otherwise I clearly ought to approve it. That is why I gave my approval and I will make an order accordingly.