IN THE HIGH COURT OF JUSTICE No. 86012008
CHANCERY DIVISION
COMPANIES COURT
[2008] EWHC 3436 (CH)

Royal Courts of Justice
Thursday, 18th December 2008

Before:

MR. JUSTICE DAVID RICHARDS

IN THE MATTER OF ROYAL SUN ALLIANCE INSURANCE PLC & ORS
-and-
IN THE MATTER OF EUROPA GENERAL INSURANCE COMPANY LIMITED
-and-
IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

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MR. M. MOORE QC (instructed by Ashurst LLP) appeared on behalf of the Claimant.

MR. C. EBORALL (instructed by the Financial Services Authority) appeared on behalf of the Financial Services Authority

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J U D G M E N T

(As approved by the Judge)

1 MR. JUSTICE RICHARDS:
2
3 1. RSAI Insurance Plc (RSAI) applies for the sanction of the court for an
4 insurance business transfer scheme involving the transfer of the general
5 insurance business written through its branch in the Republic of Ireland, ("the
6 Irish business") to a wholly owned subsidiary. The scheme also involves the
7 transfer of the general insurance business previously written in the Republic of
8 Ireland by nine subsidiaries of RSA.
9
10 2. The Irish business is comprised principally of the following classes of
11 business: property (55%), motor (21%) and liability (16%). Policies are
12 normally written on an annual basis and some 95% of the business is
13 renewable. It is essentially short-tail business, with some 70% in value of all
14 claims being settled within three years of the policy year. There are some
15 600,000 policyholders involved.
16
17 3. The statutory regime for the transfer of long term and general insurance
18 business and banking business is contained in Part VII of the Financial
19 Services and Markets Act 2000 which replaced provisions dealing with the
20 transfer of long term insurance business dating back to the 19th century. Part
21 VII also gives effect to current EU directives. There are a substantial number
22 of conditions, both in the Act and in regulations made under it, relating to such
23 matters as the authorisation of the transferee company, the giving of notice to
24 regulators and policyholders and so on, all of which have been satisfied in this
25 case. There are further provisions, in addition to the giving of notice to
26 affected policyholders, which are designed to provide protection to the
27 policyholders whose policies are to be transferred, to the remaining
28 policyholders, if any, of the transferor and to the existing policyholders, if any,
29 of the transferee. There are policyholders in all three categories in the present
30 case.
31
32 4. These statutory provisions involve: first, the appointment of a suitably
33 qualified, independent expert to report on the scheme. His appointment, and
34 the form of his report, must be approved by the Financial Services Authority
35 (FSA). In this case, as in all insurance business transfers of which I am aware,
36 the expert is an actuary with suitable experience. Secondly the FSA, as
37 regulator, is consulted on proposed transfers and actively considers proposals
38 as they develop. It is also entitled to appear on the application to the court for
39 sanction principally to raise matters of concern. It has, in the last year or so,
40 become the practice of the FSA to provide to the court a report dealing with
41 any areas of concern and how they have been addressed. Where there are
42 remaining concerns, or the circumstances otherwise make it appropriate, the
43 FSA appears at the hearing and does so on a regular basis. This practice has

proved to be of immense assistance to the court and I have been very grateful in this case to the contribution made by the FSA and its counsel on this occasion, Miss Charlotte Eborall. As many of the issues which arise on these transfer schemes are technical in nature, the assistance of the independent expert and the FSA is particularly important. Thirdly, the sanction of the court is required for the transfer. Fourthly, arising out of that requirement, the applicant, as a party making an ex parte application, owes to the court a duty of full and frank disclosure of all material facts and matters. In practice the court is greatly assisted by the submissions of experienced counsel for applicants, in this case Mr. Martin Moore QC.

5. It is convenient here to address the approach to be adopted by the court in considering whether to sanction a scheme for the transfer of general insurance business. The fact that Part VII of the 2000 Act covers long term and general business does not mean that the considerations arising on such applications are necessarily the same. Long term business, particularly with profits business, involves a large measure of discretion leading to reasonable expectations on the part of policyholders, rather than just strict contractual rights. By contrast, general business will not usually involve the exercise of discretion and judgement by the insurer. If a valid claim is made on the policy the insurer's legal obligation is to pay it. The concern of transferring general policyholders is that there should be no realistic increase in the risk of failure on the part of the insurer.

6. In my view, Mr. Moore correctly states the approach of the court in his skeleton argument where he says that "...the court will expect a critical evaluation of the financial strength of all the companies concerned and the security enjoyed by policyholders of the transferors and transferees before and after the scheme." Mr. Moore also cites in his skeleton argument, as are commonly cited in skeleton arguments on these applications, passages from the judgments of Hoffmann J in *Re London Life Association Limited* (21 February 1989) and Evans-Lombe J in *Re Axa Equity and Law Life Assurance Society Plc* [2001] 1AER Commercial 1010. The passage cited from the judgment of Hoffmann J. is as follows:

> "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…. I am therefore not concerned with whether, by further negotiation, the scheme might be improved but with whether, taken as a whole, the scheme before the court is unfair to any person or class

> of persons affected. In providing the court with material upon which to decide this question the Act assigns important roles to the independent actuary and the Secretary of State. A report from the former is expressly required and the latter is given a right to be heard on a petition."

That last sentence reflects what I have earlier said, save that it is now the FSA rather than the Secretary of State which is given a right to be heard on the application.

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.

8. The passage from paragraph 6 of the judgment of Evans-Lombe J contains a number of very helpful propositions, which I will read:

> "(1) The 1982 Act [I pause there to say that the 1982 Act was concerned with the transfer of long term business, and that references to the 1982 Act should now be read as the 2000 Act] confers an absolute discretion on the court whether or not to sanction a scheme, but this is a discretion in which it must to be exercised by giving due recognition to the commercial judgment entrusted by the company's constitution to its directors.
>
> (2) The court is concerned with whether a policyholder, employee or other interested person or any group, will be adversely affected by the scheme.

1 (3) This is primarily a matter of actuarial judgment involving a
2 comparison of the security and reasonable expectations of
3 policyholders without the scheme with what would be the
4 result of the scheme where implemented. For the purpose of
5 this comparison the 1982 Act assigns an important role to
6 the independent actuary to whose report the court will give
7 close attention.
8
9 (4) The FSA by reason of its regulatory powers can also be
10 expected to have the necessary material and expertise to
11 express an informed opinion on whether policyholders are
12 likely to be adversely affected. Again the court will pay
13 close attention to any views expressed by the FSA.
14
15 (5) That individual policyholders, or groups of policyholders,
16 may be adversely affected does not mean that the scheme has
17 to be rejected by the court. The fundamental question is
18 whether the scheme as a whole is fair as between the interests
19 of the different classes or persons affected.
20
21 (6) It is not the function of the court to produce what, in its view,
22 is the best possible scheme as between different schemes all
23 of which the court may deem fair. It is the company's
24 director's choice which to pursue.
25
26 (7) Under the same principle, details of the scheme are not a
27 matter for the court provided that the scheme as a whole is
28 found to be fair. Thus, the court will not amend the scheme
29 because it thinks that individual provisions could be
30 improved upon.
31
32 (8) It seems to me to follow from the above, and in particular
33 paras. 2, 3 & 5, that the court, in arriving at its conclusion,
34 should first determine what the contractual rights and
35 reasonable expectations of policyholders were before the
36 scheme was promulgated and then compare those with the
37 likely result on the rights and expectations of policyholders if
38 the scheme is put into effect."
39
40 9. This passage also comes from a case which concerned with profits
41 business, in particular the attribution of the inherited estate of the
42 companies concerned. This explains, in my judgement, the repeated
43 references in the numbered paragraphs to fairness and unfairness

and to reasonable expectations. In the context of that case I have no doubt that Evans-Lombe J was referring to reasonable expectations in the way in which that expression is commonly used in relation to with profits policies.

10. So far as applying those numbered paragraphs to schemes for the transfer of general business, it seems to me that the only paragraphs which are really in point are paras.1, 2, 3 & 4. The reference in para.1 to the "commercial judgment entrusted to the company's directors" is probably more in point in relation to the transfer of long term business than general business, but plainly it is a matter for the board of the company to decide whether it is going to put forward any proposal for the transfer of business. Paras.2 & 4 are directly applicable without any comment to schemes for the transfer of general business. Para.3 contains a reference to "reasonable expectations" which, as I say, was concerned with profits policyholders. However, even in the case of general business there is scope for reasonable expectations: most obviously, and this is addressed in the present case, as to the levels of service provided by the insurer to its policyholders. If reasonable expectations is read as applying to that sort of consideration, para. 3 can be applied without amendment to transfers of general business. I should say here that the evidence before the court in this case, and the view of the independent expert, is that there is no reduction in the level of service likely to be provided to transferring policyholders.

11. Accordingly, in approaching this application I shall be concerned to see whether there is any material adverse effect on the position of policyholders in any of the three groups to which I have referred. The word "material" is important. The court is not concerned to address theoretical risks. It might be said that a transfer of business from a very large company to a large company involved a reduction in the cover available to the transferring policyholders, but assuming that the transferee is in a financially strong position it matters not that the level of cover in the transferee is less than that in the transferor. What the court is concerned to address is the prospect of real, as opposed to fanciful, risks to the position of policyholders.

12. The independent expert in this case has prepared a full report and a supplemental report dealing comprehensively with the transfer, and its effect, on the different groups of policyholders. He finds that there are no areas of concern that need to be raised with regard to either the remaining policyholders in RSAI or the existing policyholders in the Irish transferee. The focus, therefore, is on the position of the transferring policyholders. The independent expert has addressed a number of issues which require to be examined, most of which I need not mention. One that is worth mentioning is

the question of the assets backing the business which are to be transferred as part of the scheme, in the light of the current turmoil in the markets. The assets are, in the main, short dated government and other bonds matching, both in time and currency, the reserves of the business. The independent actuary and the FSA do not have concerns on this score.

13. A principal matter which has been addressed, both by the independent actuary and by the FSA, is the difference in regulatory requirements for securing adequate capital backing for general insurance business in the United Kingdom and in the Republic of Ireland. Mr. Moore's skeleton argument contains a helpful summary of the relevant features of the capital adequacy rules applicable in the United Kingdom:

> "Firms are subject to very stringent and detailed financial rules. Amongst the most important are the rules that specify that a firm that is an authorised insurer must hold assets of a particular type and quality that are at least equal in value to its liabilities. Both the values of the assets and the values of the liabilities are to be calculated on a prudent basis according to a detailed set of rules. On top of those requirements, a firm must hold solvency capital as a buffer. There are also detailed rules about the type of capital that can be counted as part of this buffer.
>
> The capital requirements again involve a complex set of calculations, but in substance a firm must hold solvency capital to a value that is at least equal to the higher of two tests. The requirement is to hold that capital at all times and to have appropriate systems and controls in place in order to monitor the financial position of the firm….
>
> The two tests for determining how much capital needs to be held are known as 'Pillar I' and 'Pillar II'.
>
> For Pillar I the relevant statutory requirement will depend upon whether the company is a general insurer or a long term insurer. Leaving aside the position in relation to life companies, Pillar I is based upon EU regulatory requirements with assets taken at market values. However, only certain types of assets can count towards the calculation. The admissibility tests are designed to exclude assets the realisability of which cannot be relied upon with sufficient confidence or for which a

sufficiently objective and verifiable basis of valuation does not exist. (Such assets would include goodwill, the value of future profits or assets above a specified concentration limit.) The liabilities (or reserves) are valued with prudential margins. Having effected that calculation the solvency capital, is expressed as a percentage of premiums or incurred claims, whichever is the greater….

For Pillar II every insurance company must submit a private calculation to the FSA known as its Individual Capital Assessment (ICA) which assesses all the risks it is running and the amount of capital required to ensure that it remains solvent in all but the most extreme circumstances. The risks assessed will be market, credit, insurance, operational and liquidity risks. The FSA will consider this assessment and may adjust the company's capital requirement, in effect upwards only, by issuing an Individual Capital Guidance (ICG). An ICG will be issued if the FSA believes that additional capital is necessary to meet the required standard of 99.5% confidence level of being able to meet its liabilities over one year. This, in effect, means that a company meeting its ICA and ICG should be able to withstand a worst case "1 in 200 year" extreme event. The ICA and ICG are thus intended to reflect actual risks run by the company… Both are private calculations, commercially sensitive and not made public."

14. Pillar I gives effect to requirements of the First Non-Life Insurance Directive (73/239/EEC) (as amended) and the Insurance Groups' Directive (98/78/EC) (the Solvency I directives). In July 2007 the Commission published the Solvency II Framework Directive Proposal, which it is anticipated will be adopted in 2009 for implementation by 2012. This will require adoption of risk-based solvency tests similar to Pillar II. Where a firm is a member of a group the FSA also requires the group as a whole to carry adequate financial resources. A key feature is group capital adequacy, which the FSA is required to apply by the Insurance Groups Directive.

15. The perceived importance of Pillar II may be seen from the judgment of Evans-Lombe J in *Re Allied Dunbar Assurance Plc* [2005] EWHC 82 (Ch). The transfer in that case resulted in a reduction in the Pillar I calculation, but

the independent expert in that case reported as follows, as quoted in para.10 of the judgment:

> "2. Arguably a more important factor is the realistic strength of the company and the ability of the company to withstand stresses to this realistic position the so-called Pillar II calculations which need to be provided to the FSA from the 1st January 2005 onwards.
>
> 3. In both instances, the position of existing Eagle Star policyholders is noticeably improved as a result of the proposed scheme. The improvement in the realistic position is largely due to the significant amount of future profits expected to emerge from the portfolios (Allied Dunbar in particular), not counted in the basic statutory solvency calculation. The stressed position is also improved relative to Eagle Star alone largely because the business written in the other portfolios is in aggregate less risky in nature.
>
> 4. As a consequence, I believe that the reduction in cover on the statutory basis is adequately compensated for by the improvement in the realistic position and the ability to withstand adverse events on a realistic basis."

16. In Ireland the regulation of insurance business is undertaken by the Irish Financial Services Regulatory Authority (the Irish Regulator), an EEA competent authority under the relevant Directives. The minimum solvency requirement is derived from the same directive as Pillar I and is calculated in the same way. However, the Irish Regulator does not currently employ a risk-based measure of solvency similar to Pillar II and is not anticipated to do so until implementation of Solvency II in 2012.

17. This is a matter addressed by the independent expert in his report. He first examines the application of the minimum solvency requirements in Ireland to the transferee following the transfer. The solvency cover ratios expected over the three year period to 31 December 2011 is 2.5 times, assuming no payment of dividends during that period; the statutory minimum ratio in Ireland is 1.5 times. The expert concludes that the transferee's projected available capital over the three year period is "comfortably in excess of the Solvency I minimum capital requirements and reasonably robust measured relative to the optimistic and pessimistic scenarios described above". The expert's report continues as follows:

1 “(4.85) However, the Solvency I capital regime is much less
2 risk-based than the proposed Solvency II capital
3 regime and that currently operating in the UK through
4 the ICA. In broad terms, the Solvency II capital
5 regime is a risk-based assessment of the capital
6 requirements of an insurer over a one year time
7 horizon based on a likelihood of a less than 0.5%
8 probability of becoming insolvent. It is, therefore, not
9 a dissimilar measure to that used by UK insurers in
10 making their ICA. I have, therefore, also applied an
11 ICA test to the required level of capital to be held by
12 RSA Insurance Ireland [the transferee], in order to
13 assist me in forming my conclusions as to impact of
14 the scheme on affected policyholders.
15
16 (4.86) In order for me to assess how the projected available
17 capital held by RSA Insurance Ireland, (assuming no
18 payment of dividends from profits) in the interim
19 period between the effective date and the expected
20 introduction of Solvency II compares with the ICA
21 work undertaken by RSAI Insurance (RSAI). RSAI
22 has prepared for me the projected ICA for RSA
23 Insurance Ireland at the end of 2008/2009/2010 and
24 2011, using the assumptions underlying the ICA as at
25 31 December 2007. The projected available capital of
26 RSA Insurance Ireland at the end of 2008 is forecast
27 to be at a level that leaves the ICA well covered.
28 Further, in each case, the projected available capital of
29 RSA Insurance Ireland is forecast to comfortably
30 exceed the required level indicated by the projected
31 ICA at the end of 2009/2010 and 2011.
32
33 (4.87) It should be noted that RSAI do not commit to the
34 non-payment of dividends in their draft application to
35 the [Irish Regulator], but state that none are currently
36 anticipated in the projection period (2009 to 2011).
37 While this is not an unreasonable position for RSAI to
38 take, there is a possibility that RSA Insurance Ireland’s
39 statutory capital could fall, relative to the company’s
40 risks, to below the level established at the point of
41 dividend payments.
42

(4.88) I have received a letter of representation from RSAI whereby it undertakes that any dividend payments made by RSA Insurance Ireland for the next two to three years will be in the context of having appropriate regard to maintaining an acceptable level of capital within RSA Insurance Ireland with a view to maintaining..."

I interpose to say here that the letter of representation was later amended and I refer to the independent expert's summary as contained in his supplemental report:

"

i) An acceptable level of capital within RSA Insurance Ireland so that it operates with an appropriate level of security for policyholders from a regulatory point of view;

ii) Adequate levels of capital in relation to risk;

iii) An A minus Standard and Poors rating."

18. The independent expert, in his first report, then goes on to state that he takes comfort from the letter of representation and sets out five reasons why that is so. At para.4.90 he says:

> "After the proposed transfer RSA Insurance Ireland will remain a subsidiary of RSAI. Therefore, as stated in para.4.49 above, while there is no absolute certainty that RSAI will be able to meet in full all policyholders commitments, the existence of the parent constitutes additional (albeit non-enforceable) comfort to all the policyholders of RSA Insurance Ireland."

After considering other issues raised by the scheme, the independent expert concludes, with regard to the transferring policyholders, as follows:

> "While the proposed scheme will result in the policyholders of the Irish branch of RSAI (including those of the Additional Companies) becoming part of the smaller entity, they will continue to have a satisfactory level of security for their policies, and have the direct support of the re-capitalised base of the Irish subsidiary. I therefore conclude that the security position of the policyholders of the Irish branch of RSAI (including those with the Additional

Companies) is not adversely affected to any material extent by the scheme."

19. In reaching that conclusion one of the grounds on which the independent actuary relied was the letter of representation, as is clear from the passages from his report which I have read. In its first report to the court, the FSA drew attention to the absence from the Irish regulatory regime of any risk-based requirements such as Pillar II. The independent expert's report was then in draft and the FSA requested that further consideration be given by the independent expert to the different capital requirements of the FSA and the Irish Regulator. The FSA's report stated:

> "It is the FSA view that a key weakness in the MCR test [that is effectively the Pillar I test] is that it is not sensitive to risk and does not take account of the risk profile or risk management strategies of the insurer."

In its second report to the court, the FSA returns to this issue and states as follows:-

> "(20)The FSA remains of the view that there are substantive differences between the capital requirements that apply to insurance business carried on by Irish regulated firms, as compared to the capital requirements applied to similar businesses carried on by firms regulated in the UK.
>
> (21) Broadly, the UK capital requirements exceed what the applicable European directives (referred to below as the "Solvency I" Directives) require, and are more sensitive to specific business risks than the Irish requirements. The latter reflect the simpler and less granular approach applied to calculate the Minimum Capital Requirement (MCR) under the Solvency I Directives.
>
> (22) The IFSRA (the Irish regulator) has confirmed to the FSA that its capital requirement for the transferee will be 150% of the Solvency I MCR, calculated on a premium basis.
>
> (23) The FSA has concluded that it does not object to the scheme on the grounds of the difference in the

1 pre-scheme and post-scheme capital requirements.
2 The FSA's reasons are as follows:-
3
4 (a) The FSA is supervisor for RSA Insurance Group,
5 (the "group") and sets the group capital
6 requirement. Each year the group submits an
7 Individual Capital Assessment which considers an
8 appropriate amount of capital to be held in
9 relation to the key risks the group faces. This
10 assessment takes into account all the group's
11 overseas businesses including the business of the
12 Transferors before and after the transfer. The
13 FSA formerly reviews this assessment every two
14 years to ensure that the group holds an
15 appropriate amount of capital…. In any event, the
16 group manages its capital to maintain an S & P A
17 rating which is currently more stringent than
18 required by the FSA for ICA purposes.
19
20 (b) The Transferee's actual capital immediately
21 post-transfer is forecast to be at or over 2.5 times
22 the MCR and at a level which could cover an
23 equivalent ICA for the Transferee taking into
24 account the 2009 to 2011 projections.
25
26 (c) The majority of the business affected by the
27 scheme is short-tail business which comprises
28 risks concentrated in the motor, property and
29 liability classes. Policyholders and claimants
30 contacted will generally have a policy that is one
31 year or less before renewal/expiry. Therefore,
32 policyholders at the effective date will remain
33 policyholders only until their next renewal date.
34 At that point policyholders will in any event
35 have to decide whether to renew their policies
36 with the Transferee. The renewal documentation
37 will include the Transferee is authorised by the
38 IFSRA.
39
40 (d) Post-transfer, the Transferees will be under the
41 supervision of the IFSRA, an EEA competent
42 authority.
43

(e) The IFSRA's 150% capital requirement represents a significant margin of prudence over the MCR under the Solvency I Directives.

(f) The independent expert's supplemental report considers the effects of the recent market volatility and the restated solvency position of the Transferees post the transfer.

(g) The letter of representation to the independent expert from a group director, (also an FSA approved person) states that in making any dividend payments during the projection period to 31 December 2011 the Transferee will have appropriate regard to maintaining an acceptable level of capital within RSA Insurance Ireland so that it operates with an appropriate level of capital for policyholders from a regulatory viewpoint; adequate levels of capital in relation to risk and maintaining at least an A- S&P rating.

(h) The expectation is that by 2012 the European solvency regime for insurance business will have been revised (under the proposed Solvency II Directive) to incorporate risk-responsive/risk-based capital requirements. The FSA notes that Solvency II negotiations are presently at a relatively advanced stage."

20. In her skeleton argument for the FSA, Ms Eborall states as follows:

"(24) Despite the issues raised above concerning the difference between the risk-based approach of the FSA and the, perhaps cruder, valuation of the MCR required under the IFSRA rules the FSA does not object to the scheme. The reasons for its non-objection are in the second report.

(25) The main reason for the FSA's conclusion is the group supervisory role that it will continue to play in relation to the RSAI group. The independent

expert has also noted the existence of the parent constitutes additional comfort to policyholders.

(26) The letter of representation is a factor that the FSA has taken into consideration for making its non-objection. The FSA has weighed the letter of representation in the balance, having regard to:

i) its unenforceability - meaning that little weight ought to be given to it; and

ii) that Mr. Harris [who gave the letter] is an Approved Person who must act with integrity and deal with the FSA in an open and co-operative way - meaning the FSA could, if necessary, raise any concerns of Mr. Harris as part of the FSA's Group supervision."

21. Thus, it can be seen that on this issue there is a difference of emphasis between the FSA and the independent expert. While both conclude that, in this case, the difference in the regulatory regimes does not pose a material risk to policyholders the independent expert places weight on the letter of representation, as regards the payment of dividends, while the FSA places little weight on that factor but rather more on the fact that the RSAI Group, including the Irish subsidiary, will continue to be subject to the group capital adequacy supervision. This means (as was explained to me) that the FSA requires the group as a whole to maintain capital which satisfies Pillar I and Pillar II as regards its group wide liabilities and risk analysis. This does not provide capital at any particular level for foreign subsidiaries, such as the Irish transferee, but the combination of the group capital requirements which take into account the position of each subsidiary and the extreme improbability in the real world that RSAI would allow one of its subsidiaries to become insolvent, satisfies the FSA and, in my judgment, can satisfy the court that the transfer will not produce a materially adverse effect on the interests of the transferring policyholders. The letter of representation as to dividends also provides support.

22. However, as it seemed to me, this was posited on the Irish transferee remaining a subsidiary of RSAI. If it were sold to an insurance group outside the United Kingdom the group capital requirements, which is the protection on which the FSA principally relies, would cease to be applicable. Likewise, the letter of representation given by RSA would cease to be of any significance. A similar letter of representation has been given by the Irish

transferee, but it would have no legal force and would not be binding, even morally, on the new owner. I was told by Mr. Moore, on instructions taken over the short adjournment yesterday, that it was thought that the IFSRA would probably have regard to the letter of representation, but would not necessarily regard the Irish Transferee as bound by it. In this context it must be remembered that the letter of representation is designed to impose a level of capital requirements significantly different from, and additional to, the current requirements in Ireland. I was not reassured when told that RSAI has no plans to dispose of the Irish subsidiary. In a fast moving commercial world plans can, and do, quite properly change. This is borne out by RSAI's disinclination to give any undertaking not to dispose of the Irish subsidiary within the next three years as this would (I was told) "unduly impede its commercial freedom".

23. This morning, having considered the matter further, RSAI is prepared to offer an undertaking to the court which is designed to deal with the effect of the possibility of a sale of the Irish transferee during the period when this would be of real significance. The undertaking relates to the payment of dividends by the Irish subsidiary and is as follows:

> "...the transferee, by its counsel, undertakes that, save with the consent of the court, it will not pay any dividends or make any other distribution until after 31 December 2011 in circumstances where the ratio of its available capital to its individual capital assessment calculated in accordance with the rules of the Financial Services Authority in the United Kingdom is less than 115% or would be as a result of the payment of the proposed dividend or distribution."

The difference between that undertaking and the letter of representation which has been given, both by RSAI and by the Irish subsidiary, is that this is enforceable - the letter of representation is not. It would continue to bind the Irish transferee after any sale by RSAI because it is not linked to the continuing ownership of the transferee by RSAI. It has the effect, so far as the making of the payment of dividends or the making of any other distribution is concerned, of imposing requirements on the Irish transferee equivalent to, or in fact more stringent than, Pillar II. So far as the application of Pillar II is concerned, that would require the maintenance of 100% of the ICA whereas this undertaking requires the maintenance of 115%.

24. It does not provide protection in the event that there was adverse movement either in the assets or in the liabilities of the Irish transferee. But I consider, having regard to all the other circumstances which are referred to in the reports of both the FSA and the independent expert, that this is not a consideration which should inhibit the court from approving this transfer. As it seems to me this undertaking provides a proper level of protection so far as the transferring policyholders are concerned when they are transferred from a regulatory regime based on Pillars I and II to a regime which is based solely on Pillar I.

25. There are two additional points to note in relation to the undertaking. The first is that it expires on the 1 January 2012. The independent expert in his first report has addressed the position after 2011 in the light of the letter of representation which was available to him and he concluded, for reasons which satisfy me, that it is not necessary for this undertaking to survive the end of 2011. The second point to note is that if the Irish subsidiary proposes to pay a dividend or make other distributions in the circumstances set out in the undertaking, it will require the consent of this court, for which purpose it will have liberty to apply. In that context I should make clear that the concern of this court on the present application, and hence the purpose of the undertaking, is to provide protection to the transferring policyholders, that is to say persons who are policyholders, or were policyholders, before the effective date. I say "were policyholders" to cover those who have outstanding claims against the insurer.

26. The concern of this court is not with regard to those who may become, or choose to continue to be, policyholders after the effective date. They choose to insure, or renew their insurance, with the Irish Transferee in the knowledge that it is then supervised by the IFSRA under the Irish regime not by the FSA under the UK regime. Accordingly if, and when, an application were made to the court for consent for the payment of dividends it would, in my judgment, be right for the court to be concerned with the position of such of the transferring policyholders as remain, to ensure that their interests continue to be protected. That protection could be provided in any number of ways, such as, for example only, by the provision of reinsurance of their claims.

27. In those circumstances, I am satisfied that this is a proper scheme to sanction and that the gap in the protection of transferring policyholders, which would otherwise exist, is met to a satisfactory extent by this undertaking. I will just mention two other points in relation to this application. The first is that a comparison was made in the evidence between the compensation schemes available to policyholders in the United Kingdom and in the Republic of Ireland. It is clear that the scheme in the United Kingdom is more favourable

to policyholders, but I do not regard this as a particularly significant factor for this reason. If I thought that there was any realistic prospect of policyholders needing to have recourse to the compensation scheme, it would call seriously into question whether this was a transfer which should be approved at all.

28. Secondly, there were no objectors to this scheme. No-one has written to the companies giving notice of objection, or raising any objections, and no policyholders have appeared in person or by counsel at this hearing. I should, however, say that I do not consider the lack of objectors to be a significant factor. The lack of objectors can certainly be a significant factor on analogous but different applications, such as applications for the sanction of a scheme of arrangement under the Companies Act. However, in a scheme for the transfer of general business where there are large numbers of policyholders whose individual policies, when seen on their own, may have a relatively low value and in circumstances where the issues raised are often (as I have mentioned earlier) highly technical, it should come as no surprise that policyholders do not go into the detail of the information that is provided to them. In most cases, I suspect, they rely on those charged with statutory responsibilities in this respect and on the companies proposing the transfers to have full regard to the protection of their interests and, in my judgment, they are fully entitled to do so. Accordingly, the task of those involved in the scheme to scrutinise the effect of the scheme on policyholders is just as great where there are no objectors as in those cases where there are objectors.

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