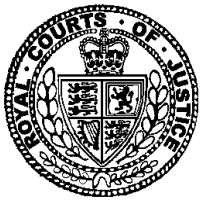

Neutral Citation Number: [2019] EWHC 129 (Ch)

Case No: CR-2018-008846

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

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

Date: 29 January 2019

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF BARCLAYS BANK PLC

- and –

IN THE MATTER OF BARCLAYS BANK IRELAND PUBLIC LIMITED COMPANY

-and-

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

- -

Martin Moore QC and Stephen Horan (instructed by **Clifford Chance LLP**)
for the **Applicants**

Hearing dates: 22 and 23 January 2019

- -

Approved Judgment

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

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction

1. Barclays Bank PLC ("BBPLC") and Barclays Bank Ireland Public Limited Company ("BBI") seek the sanction of the Court for a banking business transfer scheme (the "Scheme") under Part VII of the Financial Services and Markets Act 2000 ("FSMA").

2. Under the Scheme there are two transferring entities: BBPLC and Barclays Capital Securities Limited ("BCSL"). BCSL is a subsidiary of BBPLC. The transferee company is BBI, which is also a subsidiary of BBPLC and is a company incorporated in the Republic of Ireland. All three companies are members of the group of which the ultimate parent company is Barclays PLC (the "Barclays Group").

3. Taken together, the businesses of the three companies include (i) corporate banking, (ii) investment banking and (iii) private banking and overseas services ("PBOS"). The business of BBPLC and BCSL is conducted in the UK, and through branches of BBPLC in Germany, France, Spain, Italy, the Netherlands, Portugal and Sweden. That business is distinct from the ring-fenced UK retail, business banking and wealth and investment management business of the recently formed Barclays Bank UK PLC.

4. The commercial purpose of the Scheme is to deal with some of the issues which might arise for the international business of BBPLC and BCSL following the UK ceasing to be a member of the EU ("Brexit"). In particular the Scheme is designed to deal with the consequences for BBPLC and BCSL of a "no-deal" ("hard") Brexit, which it is envisaged would result in the two companies losing their "passporting" rights which currently permit them to provide investment services and conduct investment activities in the remaining 27 EU Member States. The design of the Scheme has been based upon an assumption that there will be no favourable outcome of the current political negotiations between the UK and the EU as regards passporting or the grant of equivalence status to the UK in respect of financial services.

5. The Scheme potentially applies to any "Clients" of BBPLC or BCSL. That expression is very broadly defined to include any person to whom BBPLC or BCSL provides a product or service in the course of its business, or with whom either of them has entered into a trade or transaction. It therefore potentially includes both persons who would be regarded as "clients" in the conventional sense, as well as market counterparties. The identity of the particular Clients who will actually be affected by the Scheme is limited to those so-called "In-Scope Clients" who are mainly identified on a USB memory stick held by Barclays' solicitors, Clifford Chance LLP, but include others who can be added by agreement. Those In-Scope Clients have been selected on the basis of an assessment of the risk that, after Brexit, BBPLC or BCSL would be required to carry out activities in relation to those Clients which the authorities in the relevant EEA jurisdiction might take the view that BBPLC or BCSL no longer had any authorisation to carry out.

6. To address this possibility, the Scheme is designed (i) to duplicate in the name of BBI the existing contractual framework of terms of business and master agreements under which BBPLC and BCSL currently conduct their businesses with In-Scope Clients, (ii) to transfer the rights and liabilities in relation to existing trades and transactions with those Clients from BBPLC and BCSL to BBI, and (iii) to transfer the assets of the relevant European branches from BBPLC to BBI. The transferred business will then

be conducted by BBI throughout the EEA after Brexit using BBI's EU passporting rights. BBI will also be the counterparty for future business with such In-Scope Clients.

7. Because of local law and regulatory concerns, including whether the transfer under the English Scheme of contracts and transactions governed by local laws will be recognised in some jurisdictions, the transfer of the business conducted from the branches in the Netherlands, Sweden and Portugal, and some of the business of the German and Italian branches, will be achieved by novation or other bespoke agreements with individual clients outside the Scheme.

8. For the In-Scope Clients, the Scheme provides for the automatic duplication of their existing terms of business and master agreements in the name of BBI, and a block transfer of their contracts, trades and transactions to BBI. It is anticipated that this will be administratively highly advantageous and will save considerable time and expenditure, both for the Barclays Group and its relevant Clients. The automatic duplication of contracts, and the collective transfer of existing trades and transactions will also avoid problems of timing mis-matches and execution risk in transferring individual contracts and trades.

9. It is, however, a feature of the Scheme that investment banking clients or counterparties who do not wish to have certain trades or transactions with BBPLC or BCSL transferred to BBI under the Scheme (e.g. to avoid breaking netting sets) will have the possibility to "opt out" in respect of those trades or transactions. The duplication of the BBPLC and BCSL contractual frameworks in BBI thus allows for some flexibility for Clients to elect to leave specific positions behind with BBPLC or BCSL, rather than have them transfer to BBI.

10. On any view, the scale of the transfer of business from BBPLC and BCSL to BBI under the Scheme is huge. The Scheme will apply to about 5,000 Clients of the two transferring companies, and on the basis of the accounts for 2017 it is estimated that about €190 billion of external assets will be transferred. The vast majority of those assets will be transferred from BBPLC.

11. Due to the continuing uncertainty over whether there might be a "no-deal" Brexit, the Barclays Group has determined that it cannot wait any longer to implement the Scheme. In light of the large volume of business to be transferred, the Scheme contains a number of phased dates upon which the transfer of the different types of business, and the business of the branches in Spain, Italy and France, will become effective. The overriding requirement, however, is that BBI must be legally and operationally ready to conduct all relevant regulated business with the In-Scope Clients by no later than 29 March 2019, which is the date currently set for Brexit.

The businesses of BBPLC and BCSL

BBPLC

12. BBPLC is authorised in the UK by the PRA and regulated in the UK by the PRA and FCA under FSMA to accept deposits and conduct a wide range of other regulated activities.

13. The business of BBPLC to be transferred is, as indicated above, divided into three lines: corporate banking, investment banking and PBOS. In outline, the corporate banking business comprises the provision by BBPLC of the following,

    i) trade and working capital products (such as letters of credit, standby letter of credit, collection services, trade loans, bills or promissory notes, performance guarantees or financial guarantees, invoice discounting, receivables financing and asset based lending and reverse factoring);

    ii) cash management products (such as deposits, cash management or liquidity products (including any accounts), services for making or receiving payments, information services and electronic banking services); and

    iii) corporate debt products (such as partnership capital subscription loans, overdraft facilities, money market loans, bilateral secured or guaranteed term loans or a bilateral secured or guaranteed revolving credit facilities).

14. BBPLC's investment banking business involves it entering into,

    i) derivative transactions;

    ii) repurchase transactions;

    iii) securities lending transactions;

    iv) secondary loans (trading) transactions;

    v) *Schuldscheine* (certificates of indebtedness issued by BBPLC to an institutional investor under a loan agreement governed by German law pursuant to which BBPLC has undertaken to repay the loan amount in accordance with the terms of the loan agreement); and

    vi) NSVs (a registered note (*Namensschuldverschreibung*) issued by BBPLC to an institutional investor under German law pursuant to which BBPLC has undertaken to repay the registered note amount in accordance with the terms of the registered note).

15. BBPLC's PBOS business comprises the provision of,

    i) investment services (including investment advisory, discretionary portfolio management, execution or custody services and investment products executed in connection with such a service); and

    ii) banking and credit products (including deposit taking accounts, foreign exchange currency and payments services, treasury managements services, term loans, unsecured lending, securities backed lending, financial planning products and services, and tailored lending).

16. BBPLC's deposit-taking business is conducted across all three of these business areas. There are approximately 1,283 Clients of BBPLC with deposits in aggregate of approximately £1.5 billion (in sterling and other currencies) in the PBOS area, €1.7 billion in *Schuldscheine*, and €1.7 billion in the corporate banking area that will be transferred to BBI under the Scheme.

BCSL

17. Although BCSL is also regulated in the UK by the PRA and FCA, in contrast to BBPLC, BCSL is not authorised to accept deposits. As I shall explain, this is an important distinction giving rise to one of the main issues which I have to decide in relation to the Scheme.

18. BCSL operates within the investment banking area. BCSL's regulatory capital and funding is provided by BBPLC, and the two companies share some senior management and are managed on a co-ordinated basis.

19. In contrast to BBPLC, which is involved in fixed income and derivatives business, BCSL is primarily involved in equity related products and services. These include equity financing, equity derivatives, cash equities and convertible bond trading, equity syndication and agency execution services. BCSL has a number of equities exchange memberships and clearing relationships, and may act as the contractual counterparty to clients for cash equities and equity finance transactions (mainly stock loans). BCSL also acts as the trader and repository of European, Far East and Asia Pacific equities required for BBPLC's business. It may also enter into equities transactions with market counterparties on a "back to back" basis, including doing so pursuant to arrangements with BBPLC in order to hedge transactions which have been entered into by BBPLC.

Contractual framework

20. At the beginning of any investment banking relationship, a professional client or an eligible market counterparty who intends to enter into transactions in products and services governed by the Markets in Financial Instruments Directive (2014/65/EU) ("MiFID2") will enter into a tripartite "Terms of Business" agreement with both BBPLC and BCSL. Under these Terms of Business, all such clients and counterparties have the ability to conduct cash securities trading, spot FX and FX forwards on the basis of the Terms of Business alone.

21. In addition to the Terms of Business, clients may also enter into further "Product Agreements" with BBPLC and BCSL in order to have the ability to access a more complex suite of products that includes for example derivative transactions or stock lending transactions. Such Product Agreements would include Master Agreements such as ISDA Master Agreements, Global Master Securities Lending Agreements and Global Master Repurchase Agreements. If the product in question relates to equities, the further Product Agreement would be entered into with BCSL, whilst other products are only offered by BBPLC.

The business of BBI

22. BBI currently provides wholesale banking, corporate banking, trade, treasury and wealth management services predominantly servicing the Irish domestic market. BBI has been authorised as a credit institution in Ireland by the Central Bank of Ireland. However, in December 2018 the European Central Bank ("ECB") informed BBI, and announced publicly, that due to the anticipated increase in size of BBI as a result of the Scheme, the ECB had decided that BBI should be classified as a significant supervised entity and should be directly supervised by the ECB from 1 January 2019.

23. The German branch of BBI has been registered and BBI is in the process of opening branches in the other locations where BBPLC currently operates on a freedom of establishment basis under the Capital Requirements Directive (2013/36/EU) and MiFID2.

The Structure of the Scheme

24. The Scheme is a complex document. I have given an outline of it above. For present purposes, its overall structure and operation is adequately summarised in clause 2 as follows,

> "2.1 On and subject to the terms of this Scheme, the Transferring Business (and, as applicable, certain Residual Items) shall by this Scheme, and without further act or instrument, be transferred by the Transferring Entities to the Transferee. Such transfer shall take effect, in respect of each part of the Transferring Business, at the Relevant Effective Time for that part and, in respect of each Residual Item, at the Subsequent Transfer Time for that Residual Item.
>
> 2.2 On and subject to the terms set out in paragraph 5 and the other terms of this Scheme:
>
> 2.2.1 each Existing Agreement shall remain with the relevant Transferring Entity and, on and with effect from the Relevant Effective Time, such Existing Agreement shall be duplicated to create a Duplicated Agreement to which the Transferee is party; and
>
> 2.2.2 each Transferring Transaction shall, on and with effect from the Relevant Effective Time for that transaction, transfer to the Transferee and become governed by the relevant Duplicated Agreement."

25. Clause 3 then outlines the nature of the Transferring Business (as defined),

> "3.1 The transferring business consists of certain parts of the business of the Barclays Group (conducted in the United Kingdom, by BBPLC's German branch or by a Transferring Branch) which relate to the supply of certain products and services and the execution of certain trades and transactions

> (herein referred to as the In-Scope Products) by the Transferring Entities to predominantly EEA Persons (herein referred to as "In-Scope Clients"). The transferring business also consists of assets and liabilities of the Transferring Branches (herein referred to as Branch Assets and Branch Liabilities) which will transfer to the corresponding branch of BBI opened in that jurisdiction. More specifically, the transferring business comprises the Transferring Assets and the Transferring Liabilities (the "Transferring Business").
>
> 3.2 The In-Scope Products are the specific products and services and trades and transactions of the Corporate Banking Business, Investment Banking Business or PBOS Business listed in the definition of In-Scope Product in Schedule 1, excluding, in all cases, the Excluded Products.
>
> 3.3 The In-Scope Clients are the Clients of the Transferring Entities referred to in the definition of In-Scope Client in Schedule 1.
>
> 3.4 The Transferring Assets are the specific rights, benefits and assets listed in the definition of Transferring Assets in Schedule 1, excluding, in all cases, the Excluded Assets. The Transferring Liabilities are the Liabilities listed in the definition of Transferring Liabilities in Schedule 1, excluding, in all cases, Liabilities arising in respect of acts or omissions of a Transferring Entity prior to the Relevant Effective Time and certain other Excluded Liabilities. The Transferring Assets and the Transferring Liabilities include the rights and benefits (subject to the burden) of each Transferring Entity arising under or in respect of each Transferring Agreement and each Transferring Transaction. The Transferring Assets and the Transferring Liabilities shall transfer to the Transferee on and subject to the terms set out in paragraph 4 and the other terms of this Scheme.
>
> 3.5 This Scheme shall not operate, or be construed to operate, to transfer or have the effect of transferring to the Transferee any Excluded Asset or Excluded Liability or any part of an Excluded Business."

26. The definition of "In-Scope Client" means an "In-Scope Corporate Banking Client", an "In-Scope Investment Banking Client", and an "In-Scope PBOS Client". Each of those definitions follows a similar form, and include (i) a Client of the relevant business division which is listed on the USB memory stick held by Clifford Chance, (ii) a Client which is party to a trade or transaction booked with a Transferring Branch (as defined), and (iii) any Clients which have agreed to be "In-Scope" for the purposes of the Scheme; but excluding, in all cases, any Client which it is agreed should be excluded. The "In-Scope Products" are defined in general terms to include those identified above in respect of the corporate banking, investment banking and PBOS businesses of BBPLC and BCSL.

Part VII FSMA

27. In order for a scheme to qualify as a banking business transfer scheme within section 106 FSMA, the scheme must be one under which, "the whole or part of the business to be transferred includes the accepting of deposits" (section 106(1)(b)), and it must satisfy the condition that (in the case of a UK authorised person) "the whole or part of the business carried on by a UK authorised person who has permission to accept deposits is to be transferred to another body" (section 106(2)(a)). It must also not be an excluded scheme (a scheme for a building society or a credit union or a scheme under Part 27 Companies Act 2006) or a ring-fencing transfer scheme (section 106(3)).

28. In the instant case, BBPLC is a UK authorised person with permission to accept deposits, and part of its business is being transferred to BBI. The Scheme is also not an excluded scheme or a ring-fencing transfer scheme. Although a business transfer scheme under Part VII FSMA must effect a transfer of the relevant type of business, there is no requirement that it should do nothing else but that: see Re Norwich Union Linked Life Assurance Limited [2004] EWHC 2802 at [11] per Lindsay J. At least so far as it concerns BBPLC, as a matter of jurisdiction, the Scheme is therefore clearly a banking business transfer scheme within the meaning of section 106 FSMA.

29. Equally clearly, however, so far as it relates to BCSL, the Scheme is not a banking business transfer scheme within the meaning of FSMA, because BCSL is not authorised to accept deposits. It is for that reason that the applicants seek orders transferring the relevant part of BCSL's business under the ancillary powers given to the Court in section 112(1)(d) FSMA, consequent upon the order sanctioning the Scheme for BBPLC. I shall return to this issue below.

30. Sections 107-108 FSMA and regulations made thereunder, and section 111 and Schedule 12 FSMA set out the conditions which must be satisfied before the Court may make an order sanctioning a banking business transfer scheme. In summary these are,

    i) that the requirements as to public notice and the supply of copies of the scheme to the Regulators in paragraph 5 of the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625) have been complied with (section 108(2));

    ii) that the appropriate certificates have been obtained from the relevant regulator as to the adequacy of the financial resources of the transferee (taking the scheme into account), and as to notification of the scheme to the relevant home state regulator of the transferee (section 111(2)(a));

    iii) that the transferee is authorised to carry on the business to be transferred or will be so authorised prior to the scheme becoming effective (section 111(2)(b)); and

    iv) that the Court considers, in all the circumstances of the case, that it is appropriate to sanction the scheme (section 111(3)).

Independent review and the Regulators

31. Unlike insurance business transfer schemes under section 105 FSMA, or the recent ring-fencing transfer schemes under section 106B, a banking business transfer scheme

does not require an independent expert's report (as an insurance business transfer does under section 109) or a scheme report (as a ring-fencing transfer scheme does under section 109A).

32. Nor do the PRA or FCA customarily prepare reports for the Court in relation to banking business transfer schemes, as they do for insurance business transfer schemes. However, under section 110 FSMA, the Regulators have the right to be heard at the sanction hearing of a Part VII scheme, and as David Richards J noted in Re ING Direct NV [2013] EWHC 1697 (Ch) at [6]:

> "The fact that the FSA [the precursor to the PRA and FCA] enjoys that right acts as a clear incentive to those proposing such transfers to secure the agreement in practice of the FSA to the transfer."

The approach to the exercise of discretion under section 111(3) FSMA

33. So far as the exercise of the discretion given to the court by section 111(3) is concerned, in Re Alliance & Leicester plc [2010] EWHC 2858 (Ch), Henderson J applied by analogy some principles drawn from the established practice of the court in relation to insurance business transfer schemes. After referring to passages from the unreported judgment of Hoffmann J in Re London Life Association Limited, 21 February 1989, and the subsequent decision of Evans-Lombe J in Re AXA Equity & Law Life Assurance Society and AXA Sun Life Plc [2001] 1 All ER (Comm) 1010, Henderson J stated,

> "44. The principles which can, and it seems to me should, be applied by way of analogy are briefly as follows. First, the relevant Act (in the present context, the 2000 Act) confers an absolute discretion on the court whether or not to sanction the scheme, but the discretion is one which must be exercised by giving due recognition to the commercial judgment entrusted by the constitution of the relevant company to its directors.
>
> 45. Secondly, the court is concerned whether an interested person or any group of interested persons will be adversely affected by the scheme. That, it seems to me, must be right, and is reflected in section 110 of the 2000 Act to which I have already referred. Indeed, this is the aspect of the matter to which I have been directing most of this judgment.
>
> 46. Thirdly, 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 , in the present case, investors or other persons holding products with Alliance & Leicester are likely to adversely affected, and the court will pay close attention to any views the FSA may express. I have already explained that the FSA has been closely involved in these proposals and is plainly content with them because it has granted the necessary certificates and has not exercised its right to be represented at the hearing.

> 47. Fourthly, and this is, I think, an important point, individual investors or holders of products may be adversely affected, but that does not necessarily 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.
>
> 48. Also of importance is the following principle. 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 eth court may deem fair, it is for the directors to choose which one to pursue; and, by the same token, the details of the scheme are not a matter for the court, provided that the scheme as a whole is found to be fair. The court will not, therefore, amend the scheme merely because it thinks that individual provisions could be improved upon."

Brexit

34. In re AIG Europe Limited [2018] EWHC 2818 (Ch), after adopting the approach in the London Life and AXA cases, I also considered the effect of Brexit upon the discretionary decision of the Court in the context of an insurance business transfer scheme. I commented, at [44]-[46],

> "44. … in considering whether the protections for policyholders are sufficient, it should be borne in mind that the current background is not the one that has often been considered in the past, where the independent expert, the Regulators and the Court are considering a transfer of insurance business which is being undertaken by the company concerned for entirely commercial reasons within its own control. The current situation is different.
>
> 45. The evidence of [the transferor] is that the uncertainty over the Brexit negotiations means that if it delayed further and did nothing, there is a real risk that substantial numbers of policyholders would be materially prejudiced in event of a "hard" Brexit by the loss of [the transferor's] EU passporting rights, and a resultant inability of [the transferor] to continue to service policies through its overseas branches or even pay policyholders' claims in other EU jurisdictions. The concerns expressed by [the transferor] seem genuine and reasonable, and in the absence of any objection or contrary evidence from the Regulators, I am not in a position to second-guess the directors of [the transferor] in this respect.
>
> 46. The consequence is that, in applying the tests in the authorities to which I have referred above, I must balance the risk of prejudice to a large body of policyholders in the EEA … if the Scheme were not to be sanctioned, against any potential risk of prejudice to individual policyholders under the terms of

> the proposed Scheme. In that regard, as was made clear by Evans-Lombe J in the AXA case, the fundamental question is whether the proposed Scheme as a whole is fair as between the interests of the different classes of persons affected. The current uncertainty over Brexit means that there may be no perfect solution for the holders of the policies being transferred …, and the possibility that some individual policyholders or groups of policyholders may be adversely affected in certain respects does not mean that the Scheme necessarily has to be rejected by the Court. It is also worth reiterating that it is not my function to produce what, in my view, is the best possible scheme: as between different schemes, all of which the Court might deem fair, it is the directors' choice which [the transferor] should pursue."

35. The evidence of BBPLC and BCSL as to the prejudice created for their businesses and clients by the continuing uncertainty over Brexit, and in particular, the substantial difficulties which would be created by a "no deal" Brexit, was in very similar terms to that which was before me in the AIG case. As in the AIG case, I have no contrary evidence from the Regulators in this case. I therefore see no reason to depart from the views that I expressed in the AIG case as to how to deal with the impact of Brexit when considering the exercise of my discretion in the instant case.

Ancillary powers of the court

36. As I have indicated above, section 112 FSMA makes provision for the effect of an order sanctioning a banking business transfer scheme under section 111, and for the making of further and ancillary orders. It provides, in relevant part,

> "(1) If the court makes an order under section 111(1), it may by that or any subsequent order make such provision (if any) as it thinks fit–
>
> (a) for the transfer to the transferee of the whole or any part of the undertaking concerned and of any property or liabilities of the transferor concerned;
>
> (b) for the allotment or appropriation by the transferee of any shares, debentures, policies or other similar interests in the transferee which under the scheme are to be allotted or appropriated to or for any other person;
>
> (c) for the continuation by (or against) the transferee of any pending legal proceedings by (or against) the transferor concerned;
>
> (d) with respect to such incidental, consequential and supplementary matters as are, in its opinion, necessary to secure that the scheme is fully and effectively carried out."

37. The meaning and extent of the power given to the Court under section 112(1)(d) FSMA has been considered in a number of cases. I shall return to consider the scope of section 112(1)(d) further below in relation to the question of whether I should use such powers to give effect to the Scheme in relation to BCSL. At this stage, suffice to say that in Hill Samuel Life Assurance Limited (unreported 10 July 1995) Knox J commented that in context, "necessary" was "somewhere in the middle between "vital" on the one hand and "desirable" on the other"; and in the Alliance & Leicester plc case, Henderson J held that it would be "necessary" to take a step if it would enable the scheme to be implemented, "in an effective and commercially sensible way".

38. Having set out the background, summarised the effect of the Scheme, and referred to the relevant statutes and authorities, I turn to consider whether the statutory requirements are satisfied and whether I should exercise my discretion to sanction the Scheme in so far as it relates to BBPLC.

Notices, certificates and authorisations

39. I am entirely satisfied on the evidence that the relevant notices and advertisements have been given as required by FSMA and the relevant Regulations. In addition, I note that a comprehensive communications programme has been conducted since the middle of last year by the Barclays Group with its Clients who are likely to be affected by the Scheme.

40. I am further satisfied that the appropriate certificates have been obtained from the ECB and PRA as required by section 111 FSMA.

41. I am also satisfied that BBI has, or will by the relevant time have, the necessary authorisations to carry on the business to be transferred to it. The primary authorisations were obtained from the Central Bank of Ireland prior to the ECB taking over supervision of BBI, and continue in force. As regards BBI's passporting operations in other EU Member States, welcome letters setting out the requirements for the operation of the branches by BBI were received in the latter part of 2018 from the relevant regulators in France, Germany, Italy and Spain following notification by the Central Bank of Ireland. The relevant formal filings required by those letters will be made in the course of the next few weeks and it would appear that permissions are likely to be given for the opening of a branch of BBI in those countries prior to the dates upon which the Scheme will take effect in respect of those branches.

Discretion

42. As regards the discretion under section 111(3) FSMA, the evidence and Skeleton Argument of Mr. Moore QC and Mr. Horan drew my attention to a number of issues that have been considered by the Barclays Group and which might be thought relevant to the exercise of my discretion to sanction the Scheme in so far as it relates to BBPLC. I do not propose to deal with them all in this judgment but refer only to a selection of the more significant.

The proportion of deposit taking business

43. The Courts have recognised the change in the nature of modern banking business and have sanctioned the transfers of banking businesses where the deposit taking activity

has not been the major part of the business being transferred. In the instant case, although the deposit taking business being transferred is not a large proportion by value of BBPLC's business to be transferred under the Scheme, it is nonetheless an integral part of BBPLC's business, and it relates to approximately 25% of BBPLC's Clients. I therefore see no reason why I should refuse to sanction the Scheme for this reason.

Duplication of contracts

44. As indicated above, the duplication in the name of BBI of the Terms of Business and Product Agreements will allow In-Scope Clients of BBPLC to transact with BBI in the future, as well as providing the necessary contractual umbrella for the existing transactions and trades with BBPLC that are to be transferred to BBI. This technique of using the power of the court under section 112(1)(d) either to "split" existing contracts or create duplicate contracts has been used in other Part VII transfer schemes and ring-fencing transfer schemes: see AIG at [40]-[41], and Re Lloyds Bank plc [2018] EWHC 1034 (Ch) at [74]-[79] (Hildyard J).

45. Although most of the terms and conditions of the duplicated contracts will remain unchanged (except for the identity of the contracting party), there will need to be a number of amendments made under section 112(1)(d) FSMA to the features of certain accounts and products to ensure that transferring contracts continue to operate without disruption upon transfer in the context of an Irish bank. The changes include consequential changes for applicable banking and tax regulation, service agent, data protection and marketing permissions. Certain PBOS accounts are also having some features removed to align them with BBI accounts to the extent operationally necessary (e.g. the availability of cheque books, charge/debit cards and the provision of overdrafts). The evidence suggests that the latter facilities are not currently used to any significant extent and that the changes are not likely to be materially detrimental to transferring Clients.

Taxation

46. The evidence indicates that no material adverse effects are expected to arise to Clients as a result of tax. In any event a Client who is concerned over a specific tax issue can choose to opt-out certain trades or transactions so that they are not transferred under the Scheme (which one potential objector has chosen to do).

Regulatory regimes

47. The regulatory regimes which currently apply to BBPLC in the UK and which will apply to BBI in Ireland are broadly similar. This is not unexpected, since BBI will be supervised by the ECB on the basis of the same European regulatory framework which underpins BBPLC's supervision by the PRA. Clients should therefore not suffer any adverse implications of the transfer from BBPLC to BBI in regulatory terms.

Ratings

48. BBPLC has ratings from Moody's, Standard & Poor's and Fitch. BBI has ratings from Standard & Poor's and Fitch and it is not currently intended that it will seek a Moody's rating. Where Moody's is specified as one of three ratings in any contractual documents, it will be deleted, but where it is one of two, the reference will be amended

to obtaining an equivalent rating from an unspecified agency. Where only Moody's is specified, the reference will be to obtaining an equivalent rating from one of the other two agencies. I am satisfied that this will provide appropriate protection for transferring Clients and counterparties.

Financial strength and insolvency issues

49. The evidence demonstrates that BBI is a financially robust institution. It is also one which is central to the financial health and reputation of BBPLC and the Barclays Group as a whole. The evidence therefore suggests that BBI is likely to be supported by BBPLC and the Barclays Group unless BBPLC or the Group was itself in financial difficulty. The insolvency of BBI is therefore a remote risk and there is, in reality, no material difference in the position of transferring Clients as regards the solvency of their counterparty.

50. The general principles underlying English and Irish insolvency law are similar. The two regimes do adopt a different approach in one respect in relation to contractual set-off in insolvency, but I do not regard that as a material detriment, and as I have indicated, I regard insolvency as a remote risk.

51. There are some potential differences for Clients relating to loss of protection from the UK Financial Services Compensation Scheme ("FSCS"). However, the overwhelming majority of transferring Clients do not qualify for FSCS protection because of their identity. Moreover, the typical size of their deposits is such that even if they fall within the categories of persons entitled to protection, it is unlikely that they would suffer significant detriment in practice. The issue would, moreover, only arise in the event of insolvency of BBI, which is a remote prospect (see above).

Litigation

52. The Scheme contains provisions providing for existing litigation which will take effect by virtue of an order under section 112(1)(c) FSMA. All existing proceedings against BBPLC or BCSL will not transfer to BBI, but all proceedings issued by BBPLC or BCSL in respect of a transferring asset or liability shall be continued by BBI in place of BBPLC or BCSL. Subject to a suggestion that the drafting might be refined, I am content that the substance of the relevant clauses in the Scheme is appropriate in the circumstances.

Recognition

53. The duplicated agreements will continue to specify English law as the governing law and will contain English jurisdictions clauses. Consideration has therefore been given to questions of jurisdiction and the recognition of English court decisions in favour of Clients in the EU (in particular in Ireland) post-Brexit.

54. Irish legal advice suggests that Irish courts would generally give effect to the choice of English law and jurisdiction clauses. Although there is some potential for Clients to be adversely affected by delays if they have to enforce an English judgment against an Irish entity in Ireland, I do not regard this risk as a substantial detriment.

55. The evidence also considered the likely recognition that will be given to the Scheme in other jurisdictions as regards the transfer of contracts, assets and liabilities governed both by English law and by other laws.

56. It would appear that the EEA jurisdictions in which BBI will operate and have its branches, will recognise the efficacy of the Scheme to transfer contracts, assets and liabilities governed by English law.

57. However, where the contracts, assets and liabilities to be transferred are governed by a local law, the position becomes less clear. For that reason, any Dutch, Portuguese or US law governed contracts, assets or liabilities are excluded from the Scheme because it was unclear whether those jurisdictions would recognise an English transfer scheme.

58. In France and Germany it appears that the order sanctioning the Scheme would be recognised, subject to compliance with any contractual restrictions on transfer. It would also appear that Italy and Spain should recognise such an order, but any contractual termination rights arising on transfer would be retained. The Barclays Group has contacted clients and counterparties in these and other jurisdictions where it is aware of potential difficulties with recognition, or where there are contractual restrictions on transfer that local law requires to be heeded, to seek to effect the transfer appropriately.

Effectiveness

59. The Court will not sanction a Part VII scheme where the order sanctioning it is likely to be ineffective to achieve its ends. The simple reason is that the Court does not wish to act in vain. But provided that the scheme will serve a substantial purpose, it is clear that the court does not require to be satisfied that the scheme will be recognised in every relevant overseas jurisdiction: see Re Sompo Japan Insurance Inc [2007] EWHC 146 (Ch) (David Richards J) at [22]; Re Mitsui Sumitomo Insurance Co Limited [2010] EWHC 1271 (Ch) (Sales J) at [7]-[8]; Re Sompo Japan Insurance Inc [2011] EWHC 260 (Ch) (Briggs J) at [38]-[39]; and The Copenhagen Reinsurance Company (UK) Limited [2016] EWHC 944 (Ch) at [45]-[46].

60. In the instant case, the evidence suggests that on the basis of a sample contract review, just over 65% of the contracts sampled were governed by English law; another 7% were governed by English law and another governing law; and the remainder of the contracts had no one significant governing law.

61. On this basis and given the analysis above, I am satisfied that a sufficiently large proportion of the transfers of BBPLC's contracts under the Scheme will be recognised in other relevant jurisdictions, and so the Scheme will serve a substantial purpose if sanctioned.

"Wrong Pockets"

62. During the course of the hearing I raised two additional issues that concerned me over the terms of the Scheme. The first related to the so-called "Wrong Pockets" and "Reverse Wrong Pockets" provisions in the Scheme. Put simply, the idea of a "wrong pockets" provision in a conventional business transfer scheme is that if it is discovered after the scheme has become effective that a particular policy or contract has been transferred in error, or transferred to the wrong transferee company, the parties can,

without further recourse to the court, transfer it to the correct transferee (or back to the transferor).

63. Such provisions are a sensible precaution to deal with the errors that are bound to arise in complex modern transfer schemes. They also generally apply to customers or clients who will have been notified of the scheme in question. In this regard I had no issue with the terms of the "Reverse Wrong Pockets" clause in the draft Scheme. The effect of that provision was that if a trade, transaction or contract had been transferred to BBI in the expectation that BBI would be able to service it after Brexit, but that, contrary to expectations, it turned out that BBI would or might be required to engage in a "Prohibited Activity" that it would not lawfully be able to do, then BBI and BBPLC could agree that the trade, transaction or contract could be retransferred to BBPLC.

64. The utility of that provision is readily apparent. To put it colloquially, if the Scheme attempted to put a Client into a better position post-Brexit in which its contracts, trades and transactions could lawfully be serviced by BBI, but it turned out that this was not the case, then it would be desirable for the Barclays companies to be able to put the Client back to where it would have been in the absence of the Scheme. Moreover, given that BBI is to be broadly authorised to operate within the EU, it is most unlikely that this situation will arise in practice.

65. The "Wrong Pockets" clause was designed to operate in the other direction. As drafted, if a contract, trade or transaction was <u>not</u> intended to be transferred to BBI under the Scheme, but it turned out, after Brexit, that BBPLC would or might not be able to service that relationship without engaging in a Prohibited Activity, the clause provided that BBPLC and BBI would be able, by agreement between them alone, to transfer the contract, trade or transaction to BBI without giving any prior notice to the Client concerned, and without giving the Client any opportunity to object.

66. Given that such a Client would, *ex hypothesi*, not have been consulted about the Scheme in the first place, it seemed to me that such a clause would, in effect, permit BBPLC and BBI an uncontrolled power to extend the Scheme to a Client who would have no opportunity to opt out (as those who have been consulted in advance have had) and no opportunity to object to the Court (as others have had at the sanction hearing).

67. When I made these points during the course of the hearing, the applicants agreed to amend the terms of the Scheme so as to provide that the "Wrong Pockets" clause will only have effect if BBPLC has given written notice to the relevant Client, and that Client either informs Barclays that it does not object to the transfer, or 28 days have elapsed without the Client having notified Barclays that it objects to the transfer. I am satisfied that the proposed amendment adequately protects the interests of Clients.

Excluded Assets

68. In argument, I also raised a question in relation to an amendment that had been made to the definition of Excluded Assets in the draft Scheme. At least on one reading, the resultant wording appeared to give the Barclays companies *carte blanche* to decide to include in the Scheme, and hence to transfer to BBI, an unrestricted and undefined category of "rights, benefits or assets that do not relate to a Client". After raising the point, further evidence was filed clarifying that it was not intended that BBPLC and BCSL should have an unrestricted discretion to bring a potentially unlimited range of

assets unrelated to Clients into the Scheme. The evidence indicated that the wording had only been intended to capture some "protected deferred tax assets" of BBPLC's Spanish branch, which did not relate to any particular Clients, but which it was intended should be transferred to and made available to BBI in respect of the future operations of BBI's Spanish branch. The applicants therefore suggested some alternative wording for the Scheme that was more closely restricted to tax assets, and with which I am content.

Employees

69. Employees of BBPLC and BCSL who work in relation to the In-Scope Products will transfer to BBI in Ireland or to one of seven BBI branches in Europe pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") on terms and conditions of employment that, broadly, are no less valuable overall and with continuity of employment, subject to any local law requirements.

70. Current employees of the transferring branches as at the applicable transfer date will also automatically transfer, within the same country, to the corresponding BBI branch pursuant to the applicable national legislation implementing the Transfer of Undertakings Directive (2001/23/EC) on existing terms and conditions and with continuity of service.

71. The Barclays Group has also engaged with the trustee of the Group's main defined benefit pension scheme. There is no change to the structure of the pension scheme as a result of the transfer and no assets or liabilities of the pension scheme will be transferred. The trustee has indicated that it considers there is no material detriment to the employer covenant of BBPLC as a result of the Proposals.

The Regulators

72. The PRA and FCA have been consulted about the proposals and reviewed drafts of the Scheme and the communications with clients. Although they did not exercise their right to appear, both the FCA and PRA provided statements to the Court indicating that they had no reason to oppose the sanction of the Scheme.

Communications with Clients and potential Objectors

73. I was provided with a digest of the feedback from the extensive communications exercise which has been undertaken with Clients, together with the communications with two significant German institutions which had initially indicated an intention to oppose the Scheme over concerns about netting sets and tax issues. There is nothing in that feedback that causes me any concern and the two German institutions withdrew their objections upon it being made clear to them that they could, if they wished, opt individual trades out of the Scheme and, so far as necessary, proceed to resolve them with Barclays on a bilateral basis.

Conclusion in relation to BBPLC

74. On the basis of the considerations outlined above, I see no reason why I should not sanction the Scheme to the extent that it relates to the transfer of the business of BBPLC. The Scheme is a carefully crafted and fair proposal to deal with the problems for

BBPLC and its Clients caused by the continued risk of a "no-deal" Brexit. It provides a mechanism by which the business relationship contracts and the existing trades and transactions between the In-Scope Clients and BBPLC can be transferred to BBI in a cost-effective and efficient manner. This will minimise the administrative burden on both sides and reduce the risk of mis-matches and timing issues.

BCSL

75. The position in relation to BCSL is more complex.

76. As indicated above, BCSL is not authorised to accept deposits, and hence could not itself propose a banking business transfer scheme in relation to its own business under Part VII. The Scheme has, however, been drafted on the footing that it applies to the business of BCSL as well as to the business of BBPLC. This approach reflects the evidence that BBPLC and BCSL are very much financed, managed and operated as a single business unit and seek to provide a "seamless" service to Clients.

77. That commercial reality does not, however, mean that the Court can simply ignore the separate legal personalities of the two companies and treat them as one for the purposes of Part VII FSMA. Recognising this, the applicants nonetheless submit that I can and should give effect to the Scheme in so far as it relates to BCSL by making an order under section 112(1)(d) FSMA on the basis that the transfer of BCSL's business as regards its In-Scope Clients is an "incidental, consequential and supplementary matter … necessary to secure that the scheme [in relation to BBPLC] is fully and effectively carried out."

78. As this would be a novel use of the Court's powers under section 112(1)(d), and given the time constraints imposed by a combination of the need to consult with their Clients and Brexit, BBPLC and BBI applied to the Court at an early stage of the Part VII process in October last year for a determination as to whether, as a matter of principle, the Court might have jurisdiction to make such an order. That application was heard and determined by Zacaroli J, who concluded (on a necessarily provisional basis given that the application was unopposed and was argued as a matter of principle) that an order to give effect to the transfer of the business of BCSL was capable of falling within section 112(1)(d) FSMA: see Re Barclays Bank plc [2018] EWHC 2868 (Ch).

79. After concluding that there were no authorities directly on point, Zacaroli J explained his approach to the application as follows (at [35]),

> "35. In the absence of any person appearing so as to put forward arguments in opposition to the application, there appeared to me to be three potential objections to it, which I need to consider:
>
> i) Whatever else might be contemplated by section 112(d), it cannot be used to effect a transfer of the business of a third party entity, where that entity's business does not include accepting deposits and so could not be transferred under a scheme within section 111;

> ii) The transfer of BCSL's business could never be said to be "necessary" to secure that the Scheme (that is the transfer of BB's business to BBI) is fully and effectively carried out; and
>
> iii) The transfer of BCSL's business cannot be regarded as something "incidental, consequential or supplementary" to the order made under section 111 transferring BB's business."

80. On the first issue, Zacaroli J referred to the breadth of the wording of section 112(1)(d) and focussed, at [45], on the essential elements of a business transfer under Part VII. He identified these as the modification of the contractual rights and obligations of counterparties of the transferor, by requiring them to accept performance by the transferee in place of the transferor. Zacaroli J addressed the issue of whether it was possible to use section 112(1)(d) to achieve a similar modification of the rights of a counterparty of the transferor in respect of their contract with a third party.

81. In answering that question in the affirmative, Zacaroli J referred to my decision in The Copenhagen Reinsurance Company (UK) Ltd [2016] EWHC 944 (Ch). The case was an insurance business transfer in which I had granted an order under section 112(1)(d) amending the terms of a guarantee given to the Institute of London Underwriters ("ILU") for the benefit of policyholders by an ex-parent company of the transferor. I concluded that it was an integral feature of the way in which the policies in question had been sold that they came with the benefit of the guarantee given to the ILU by the guarantor, and that it was necessary in order to give full effect to the transfer of the policy so far as the policyholder was concerned, that the benefit of the guarantee should be retained. I therefore ordered the guarantee to be amended so as to refer to the obligations of the transferee rather than the transferor.

82. Zacaroli J concluded, and I agree, that the decision in Copenhagen Re could be viewed as an example of section 112(1)(d) being used to modify the rights and obligations as between a counterparty of the transferor (the policyholder) and a third party (the guarantor). In fact, the decision in Copenhagen Re went further than that, because although the guarantee was given for the benefit of policyholders, in law it was given by the guarantor to a fourth party (the ILU) rather than directly to the policyholder. That extension is of potential significance given the nature of some of BCSL's business, for reasons that I shall explain below.

83. So far as the second point was concerned, Zacaroli J explained his approach as follows (at [48]),

> "48. One of the matters for the court to determine on the basis of the evidence adduced on the application to sanction the Scheme will be whether the degree of interconnectedness between clients' relationships with BB and with BCSL, and the consequences of not making an order under section 112(1)(d) transferring BCSL's business, are in fact sufficient to persuade the court to exercise its discretion to make such an order. At this stage, the only question for me is whether – on the assumption that the evidence at the sanction hearing is sufficient – the order sought would nevertheless be incapable of falling within the

> meaning of "necessary to secure that the scheme is fully and effectively carried out"."

84. Zacaroli J then concluded that on the assumption that the evidence at the sanction hearing made out the case, the transfer of BCSL's business was capable of being "necessary to secure that the scheme is fully and effectively carried out". His reasoning was as follows,

> "52. The purpose of the Scheme in this case is to enable the business currently conducted by BB to be carried on seamlessly in the event of BB's loss of authorisation to conduct business in the EEA post-Brexit. For the purposes of determining whether the transfer of BB's business can be fully and effectively carried out, it is essential to consider whether it will result in BBI being able to conduct, as a matter of practical reality, the business currently carried on by BB. If, as the evidence suggests, that will not be possible in the event of a no-deal Brexit (without the considerable expense and potential difficulties inherent in multiple bilateral agreements with each affected client), but it could be achieved by a transfer of BCSL's business to BBI, then the order sought could be described as "necessary" within the meaning of section 112(1)(d).
>
> 53. Alternatively, looking at it from the perspective of BB's clients (whose interests the court is required to take into account), they have conducted business seamlessly with BB and BCSL as if under one umbrella relationship. Unless their contractual relationships with BCSL are also transferred to BBI, they will be likely to suffer prejudice in relation to their dealings with BBI as a result of the inability of BCSL to conduct business in the EEA."

85. Finally, and again on the assumption that the evidence at sanction would show that BBI would in practice be unable to service the requirements of the transferring clients of BBPLC unless BCSL's business was also transferred, Zacaroli J held that it would not be a mis-use of language to describe the necessary order under section 112(1)(d) as "consequential" or "supplementary" to the transfer scheme for BBPLC.

86. Zacaroli J's decision was expressly a decision in principle only and made it clear that was based upon various assumptions as to what the evidence might show at the sanction hearing, in particular as to "the degree of interconnectedness between the Clients' relationships with BB and with BCSL, and the consequences of not making an order under section 112(1)(d)". As it was, the evidence relied upon by BBPLC and BBI before me as to the nature of BBPLC's and BCSL's investment banking businesses and their relationships with Clients was little changed from the evidence that had been before Zacaroli J. I did not have any more detailed analysis of the business relationships or explanation of the practical difficulties that would be encountered by BBI were the order not made in relation to BCSL. When I raised this at the hearing, Mr. Moore QC responded that I would have to deal with the issue "at a conceptual level rather than at a granular level".

87. I will therefore turn first to consider what, as a matter of concept, the investment banking business of BBPLC to be transferred under the Scheme actually comprises and how precisely that is to be achieved.

88. As set out above, the transfer of the investment banking business of BBPLC is to be achieved in the following way:

    i) by the duplication in the name of BBI of the Terms of Business and Product Agreements entered into by BBPLC with its In-Scope Clients in relation to In-Scope Products. This is not a transfer of business as such, not least because the existing umbrella contracts are being left with BBPLC. But this stage establishes the necessary duplicate contractual framework into which the relevant trades and transactions comprising the Transferring Business are to be transferred. The duplication of the Terms of Business and Product Agreements is achieved pursuant to an order under section 112(1)(d);

    ii) by the transfer of the rights and obligations of BBPLC in relation to any existing trades and transactions which BBPLC has entered into with its In-Scope Clients in relation to In-Scope Products. This is achieved by an order under section 112(1)(a); and

    iii) by the transfer of assets and liabilities of BBPLC which are associated with the trades and transactions to be transferred. These include, for example, collateral and other security rights relating to the transferred trades and transactions, together with the assets and liabilities of the EEA branches which are to be transferred. This is achieved by an order under section 112(1)(a).

89. If I analyse the business of BCSL to be transferred in the same way, it is the case, first, that all of the In-Scope Clients will have signed the tripartite Terms of Business with BCSL. As I have indicated, I am content that those Terms of Business should be duplicated in the name of BBI as part of the transfer of the business of BBPLC's In-Scope Clients. That is a fundamental precursor to the transfer of any trades or transactions of BBPLC to BBI. It is also all that it is necessary to be done in relation to the Terms of Business, because there is only one transferee, namely BBI. There is thus nothing more that needs to be done in this regard so far as BCSL is concerned.

90. I also do not consider that the existence of the Terms of Business carries me any further in relation to the nature and extent of the interconnection between the businesses of BBPLC and BCSL for the purposes of section 112(1)(d). Specifically, I reject the submission made by Mr. Moore that, of itself, the fact that all Clients of BCSL (including market counterparties) have entered into the tripartite Terms of Business demonstrates a sufficient connection between the transferring business of BBPLC and the business which BCSL desires to transfer so as to enable me, without more, to invoke section 112(1)(d).

91. The simple point is that the Terms of Business, by themselves, are merely an agreement as to the terms upon which either BBPLC or BCSL might conduct future business with Clients. The Terms do not, of themselves, constitute any actual trades or transactions which might show some relevant connection between the business of BBPLC to be transferred and the business of BCSL which it is desired should be transferred. Put simply, a Client of BCSL who signed the Terms of Business might never enter into any actual business (i.e. any trades or transactions) with BBPLC at all, and may have no intention of doing so.

92. I also observe in passing that if the Terms of Business were, in themselves, sufficient to satisfy the requirements of interconnectedness of the businesses identified by Zacaroli J, it is surprising that his attention was not drawn to the point at the earlier hearing, thus saving him considerable time and effort in the formulation of his judgment.

93. Secondly, and in a similar vein, the Product Agreements entered into by BCSL with its In-Scope Clients are merely umbrella agreements for the conduct of future business; they concern different Products to those of BBPLC; and they would only give rise to any actual rights or obligations as and when they are incorporated by reference in the confirmation of an actual trade or transaction. Of themselves they tell me nothing about the linkage between the business which BCSL wishes to transfer and the business of BBPLC which is to be transferred.

94. Instead, it seems to me that the necessary linkage can only come from an analysis of the actual trades and transactions conducted between BBPLC and its In-Scope Clients (on the one hand) and those entered into between BCSL and its In-Scope Clients (on the other hand). As I have indicated, I had no specific evidence in this respect. I was, however, given a number of conceptual examples of different types of composite or related transactions which would involve both BBPLC and BCSL. Those examples involved Agency Lending, Prime Financing, Equity Financing and Equity Syndication. I have annexed copies of those examples to this Judgment.

95. On the basis of those examples I am prepared to accept,

    i) that if an In-Scope Client of BBPLC has existing trade(s) or transaction(s) with BBPLC (either under the Terms of Business alone or under one or more Product Agreements) which are to be transferred under the Scheme,

    ii) that Client also has existing trade(s) or transaction(s) with BCSL (either under the Terms of Business alone or under one or more Product Agreements), and

    iii) those existing trade(s) or transaction(s) form part of a composite transaction or a course of dealing involving both BBPLC and BCSL,

    the duplication of any relevant BCSL Product Agreement(s), and the transfer of the rights and obligations under the existing trade(s) or transaction(s) with BCSL to BBI, could properly be the subject of an order under section 112(1)(d).

96. To hold otherwise would force a severance of a composite transaction, or a course of dealing involving both BBPLC and BCSL. This would inevitably detract from the purpose and utility of the duplication of BBPLC Product Agreements with that Client

and the transfer of the rights and liabilities of BBPLC as regards that Client to BBI. As I understand the examples that I was given, this could include the Agency Lending and Equity Syndication types of transaction: and it might also cover some (but not all) of the Clients identified in the Prime Financing example.

97. I would also extend the same reasoning to a case in which an In-Scope Client of BBPLC does not, for whatever reason, have any existing (open) trades or transactions with BBPLC at the relevant effective date under the Scheme, but has entered into the same or similar composite transactions or a course of dealing involving both BBPLC and BCSL in the recent past, and it is reasonably envisaged by BBPLC and BBI that such Client may enter into the same or similar transactions in the future, for which the duplication of the existing BBPLC and BCSL Product Agreements would be required.

98. Where, however, I have real difficulty, is a case in which an In-Scope Client has only ever entered into, and may only ever intend to enter into, trades or transactions with BCSL.

99. To take a very simple example, consider Client "A" which has an equity investment in an EEA company, and wishes to protect itself against the fall in value of that investment. Assume that it enters into a Product Agreement and a derivative trade referencing the EEA company with BCSL for that purpose. In the ordinary course of events, BCSL would almost invariably wish to hedge its exposure to that trade by entering into a Product Agreement and a back-to-back trade with a market counterparty "B".

100. Mr. Moore QC confirmed to me that both "A" and "B" would potentially be treated as In-Scope Clients of BCSL. Accordingly, if either of them were based in the EEA, and it were thought possible that BCSL might be unable to deal with them so as to carry out those trades after a "no-deal" Brexit, it would be intended to duplicate the relevant Product Agreements in the name of BBI and to transfer the rights and obligations of BCSL against the relevant counterparties to BBI.

101. In my judgment, the transaction which I have described has no necessarily relevant connection with the business of BBPLC which is being transferred under the Scheme at all. It might simply be, as I have indicated, that neither "A" or "B" has any intention to conduct any business with BBPLC, ever.

102. The position may be equally stark even if one assumes that "A" is a client of BBPLC. Assume that "A" is a UK-based client which enters into a derivative with BBPLC in England on the basis of a Product Agreement governed by English law. I was given to understand that the hedge in such a case might still be entered into by BCSL as principal with "B", albeit on the basis of some intermediate arrangement between BCSL and BBPLC. Mr. Moore QC confirmed that in this example, even though the transaction between "A" and BBPLC was not being transferred to BBI, if "B" was an EEA entity, it would be intended that an order should be made under section 112(1)(d) duplicating the Product Agreement between BCSL and "B" and transferring the rights and obligations of BCSL against "B" to BBI.

103. But in this situation, I simply cannot see how the order sought in relation to BCSL and "B" could be said to be necessary to secure that the Scheme for BBPLC would be given full effect, since the only business of BBPLC to which the transaction between BCSL and "B" related would not be being transferred under the Scheme.

104. Mr. Moore QC nonetheless submitted that given that there was some transfer of other business by BBPLC under the Scheme, I could interpret section 112(1)(d) as enabling me to do what was necessary to protect and enhance the financial stability of BBPLC as regards any business that was not being transferred. He submitted that in the example under discussion this would include anything necessary to ensure that BCSL could carry out the hedge with "B", effectively on BBPLC's behalf.

105. In that regard Mr. Moore referred to the comments of Rimer J in Re Hill Samuel Life Assurance [1998] 3 All ER 176 at 179 a-c. The comments concerned terms in a scheme that provided, as between the transferor and transferee of a portfolio of insurance policies, for the destination of premiums paid, and as to which of them was, by reinsurance arrangements, effectively to take responsibility for honouring policies which could not be transferred, so far as the policyholder was concerned, without the consent of an overseas authority. Rimer J plainly regarded such an arrangement between transferor and transferee as "an inherent and essential part" of the commercial deal for the transfer of the portfolio as a whole, but he also accepted an alternative submission that the equivalent of section 112(1)(d) could be used to give effect to such terms.

106. I consider that the decision in Hill Samuel is clearly distinguishable, and I do not accept Mr. Moore's submission. What Rimer J was doing in Hill Samuel was to give effect to an agreement between transferor and transferee as regards their treatment *inter se* of policies that formed part of the commercial deal, but were subject to a technical restriction on transfer. That is very far removed from the example under discussion, which would involve making changes to the terms of a contract between two other parties, neither of which was transferor or transferee, in order to benefit the transferor in respect of a contract which it does not wish to transfer as part of the commercial deal.

107. Even giving the concept of "necessity" the most liberal and interpretation I could, while I think it is plain that section 112(1)(d) is aimed at ensuring that the agreed scheme for transfer of business is carried out in a commercially effective way, that does not extend to providing a commercial enhancement to business that the transferor and transferee have decided should not be transferred.

108. A more difficult variation on the scenario above would be one in which (as before) "A" dealt with BBPLC, there was an intermediate agreement between BBPLC and BCSL, and BCSL entered into a hedge with "B": but assume this time that both "A" and "B" are EEA entities. The applicants' intention in such a case would be that both contracts with "A" and "B" should be transferred to BBI. That situation is not dealt with by the formulation which I am content to adopt as set out in paragraph 95 above, because neither "A" nor "B" would have a trade or transaction with both BBPLC and BCSL. As I understand it, a similar point might apply to the EEA market counterparties of BCSL in the Prime Financing example that I was given: those market counterparties would be Clients of BCSL, but might not have had any dealings with BBPLC.

109. This is a situation in which, at least as a matter of jurisdiction, the extended basis for the order which I made in Copenhagen Re might be significant. That is because the order sought under section 112(1)(d) would relate to a transaction between BCSL and "B", neither of which was a counterparty of the transferor to which Part VII applied (BBPLC).

110. There is, however, nothing in the instant case which is directly equivalent to the guarantee which represented part of the benefit of the arrangement for the transferring policyholder in Copenhagen Re. It may well be, for example, that "A" has no idea (and may not care) whether or how BBPLC has hedged its transaction. In that respect, the situation might be thought to be some way removed from the facts of Copenhagen Re in which the policyholder was well aware of, and had doubtless paid for, the benefit of the guarantee of the policy given by the guarantor to the ILU when it took out its policy.

111. Nonetheless, and going beyond Copenhagen Re, I am prepared to accept that if, in the example which I have given, there was a direct commercial connection for BBPLC between its trade with "A" and the hedge for that specific transaction between BCSL and "B", then it would be necessary to give full commercial effect to the transfer of the trade between BBPLC and "A" for the hedge between BCSL and "B" also to be transferred to BBI. In that way, the trade and what is in effect a back-to-back hedge are kept together, and BBI is enabled to use the proceeds of the hedge with "B" to honour its commitments to "A" under the trade (or vice versa). I would therefore be prepared to make an order under section 112(1)(d) in such a case.

112. However, in the absence of any such direct commercial correlation between the trades by BBPLC and BCSL with their respective counterparties, I simply do not think that I have the evidence to see what connection other similar trades involving Clients who have only dealt with BCSL might have with the transferring business of BBPLC, or to assess the potential impact upon BBPLC or BBI of not transferring such trades or transactions which are only between BCSL and its counterparties.

113. In the case, for example, of prime financing, I am told that BBPLC generally has a right to rehypothecate securities of its Clients for its own benefit. This it may do through arrangements with BCSL and ultimately by trades between BCSL and its market counterparties. This may well be done on a global ("pooled") basis which does not connect any trades or transactions entered into by BBPLC with its Clients, with any particular trades or transactions entered into by BCSL with its market counterparties. In such a situation, it might be, for example, that the trade by BCSL with its counterparties was indivisible, and hence could be said to be necessary to transfer that trade to cover BBPLC's position as regards the rehypothecation of the securities of its EEA In-Scope Clients. But that might well not be so. BCSL might have dealt with a variety of counterparties.

114. In the absence of any specific evidence as to the position, in such a scenario I simply cannot conclude, as a matter of concept, that it would inevitably be necessary to transfer any and all of BCSL's trades and transactions with its EEA counterparties to BBI in order to enable BBI to fulfil its obligations to those EEA Clients whose transactions with BBPLC have been transferred to BBI.

115. That said, and moving on from questions of the transfer of trades and transactions themselves, I am satisfied that if I have concluded that it is necessary to transfer a trade or transaction between BCSL and one of its Clients to BBI, then it would also be necessary as a consequential matter to transfer the collateral and any other associated security or other rights to BBI.

Conclusion in relation to BCSL

116. I therefore am prepared to order the transfer under section 112(1)(d) of some, but not all, of the business of BCSL which the Scheme seeks to have transferred to BBI.

117. When I raised this possible outcome with Mr. Moore QC at the hearing, he indicated that given the limited number of Clients who have dealt only with BCSL, such a conclusion ought to be manageable by bilateral agreements outside the Scheme. He did, however, indicate that it might be necessary to make appropriate amendments to the Scheme and/or the list of In-Scope Clients on the USB memory stick. I shall consider any such amendments as may be proposed after I hand down this judgment.

Timing

118. I cannot conclude this judgment without making a short observation about the timing of this sanction hearing.

119. In two well-publicised decisions in October and November last year, I had cause to remark upon the growing tendency of proponents of Part VII transfer schemes or restructuring schemes under Part 26 of the Companies Act 2006 to file complex documents late, and to give the appearance of treating the Court as a rubber-stamp by assuming that a judgment sanctioning the scheme would be given immediately. I made it explicit that this was not appropriate.

120. For example, in Noble Group Limited [2018] EWHC 2911 (Ch) at [178]–[180] I said,

> "178. … As has been demonstrated on many occasions, flexibility and the ability to move swiftly when a genuine need arises is a particularly attractive and useful feature of the process for schemes of arrangement. The Companies Court will also always do what it can to accommodate the business needs of its users. However, it has been made crystal clear on numerous occasions that the Court is not a "rubber-stamp" for schemes of this (or any other) type. It is important that the Court is not taken for granted and its willingness to assist must not be abused.
>
> 179. That means that the Judge hearing a scheme case needs to be given adequate time for pre-reading and for the hearing, including time to consider what decision to make and to prepare a judgment …
>
> 180. In practical terms, solicitors and counsel must ensure that the Court Listing Office is informed well in advance of the true extent of the matter so that a suitable Judge can be assigned and given a realistic amount of pre-reading time in his or her

> schedule. The hearing bundles and skeleton argument must be lodged well in advance and certainly no later than two clear days before the hearing as required by paragraph 21.77 of the Chancery Guide. Further steps should also not be arranged on a timetable that presumes that the Court will give its decision immediately."
>
> (my emphasis)

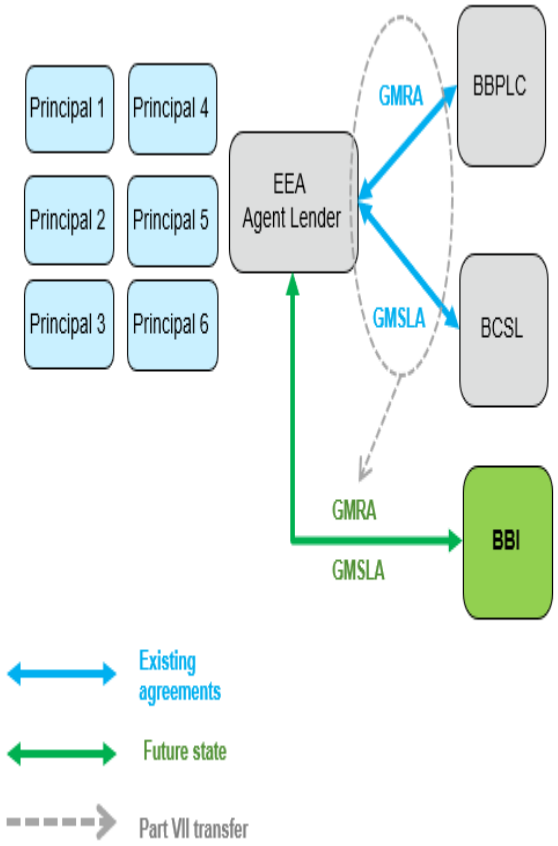
121. This Scheme has been in gestation since about June 2017, and the hearing dates were fixed in July 2018. Mr. Moore QC has explained the various pressures upon the Barclays Group when fixing the Scheme timetable, which apparently included a requirement from the Regulators that three months should elapse between the directions hearing before Zacaroli J and the sanction hearing, together with an understandable wish to wait to see if there might, at some point, be greater clarity over the Brexit process.

122. Be that as it may, the net result of the process was that when the matter came on before me last week on 22 January 2019, I was informed that it was intended that the Initial Effective Date of the Scheme should be 26 January 2019, so that the Spanish branch of BBPLC could be transferred on 1 February 2019. I was also told that the practical effect of those dates was that if the Scheme was to be implemented as planned, the applicants needed an order to be made on 23 January 2019, i.e. on the second day of the hearing.

123. This was, in my view, an unrealistic timetable. This was a significant, complex, and in certain legal respects, a novel scheme. It could not at any point in the design of the process have been thought that the Court would simply wave the Scheme through without having time for consideration. There could, moreover, have been opposition to the Scheme at the sanction hearing.

124. I therefore repeat that applicants and practitioners who have schemes of this complexity must, when arranging timetables, give the Court sufficient time to do its job properly. They should not treat the Court hearing as a formality, and they should not make arrangements for steps to be taken on the basis that the Court will necessarily give its decision immediately.

Agency Lending



- As part of its Investment Banking division, Barclays' agency lending business is conducted through BBPLC and BCSL with BBPLC conducting this business in respect of fixed income securities and BCSL conducting this business in respect of equity securities.

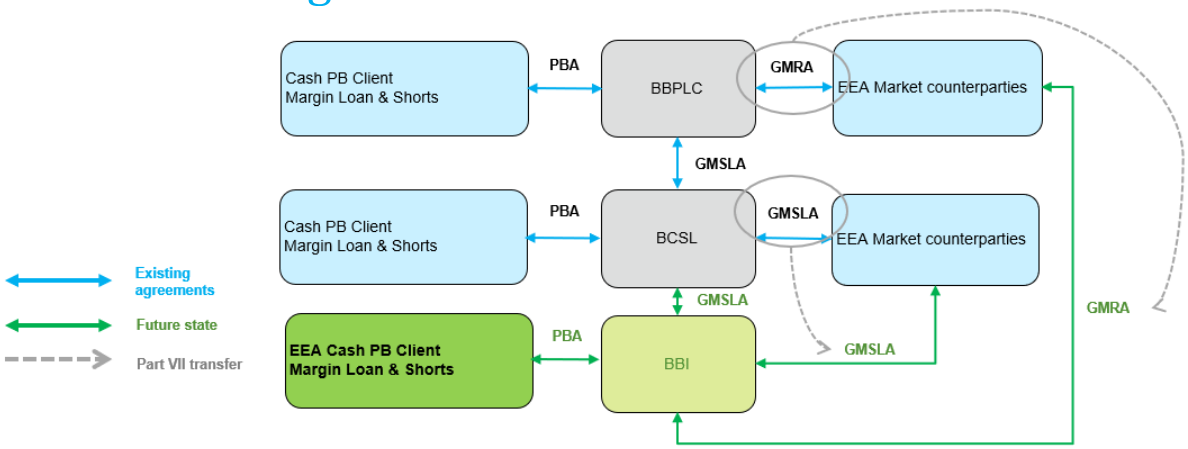
- EEA Agent Lenders are appointed by various market participants such as pension funds who hold large portfolios of securities. This joint structure affords access to liquidity, covering both fixed income and equity assets classes, in order to support Barclays' market-making and other client businesses.

- Pursuant to these arrangements, Barclays and the EEA Agent Lender enter into two master agreements: (i) a Global Master Repurchase Agreement ("GMRA") with BBPLC for the borrowing of fixed income securities and (ii) a Global Master Securities Lending Agreement ("GMSLA") with BCSL for the borrowing of equity securities.

- For example, as at the end of September 2018, Barclays' had borrowed circa $7bn in fixed income securities through BBPLC and $1bn in equity securities through BCSL from one particular EEA Agent Lender.

- Following Brexit, Barclays' EEA Agent Lenders and the underlying principals will expect to continue to be able to lend both types of securities to Barclays. Further, Barclays will need to access this form of liquidity to provide services to clients of BBI as described in further detail below. It is therefore important that BCSL's current arrangements with EEA Agent Lenders under GMSLAs, that form part of the proposed BCSL Transferring Business, transfer to BBI.

Prime Financing



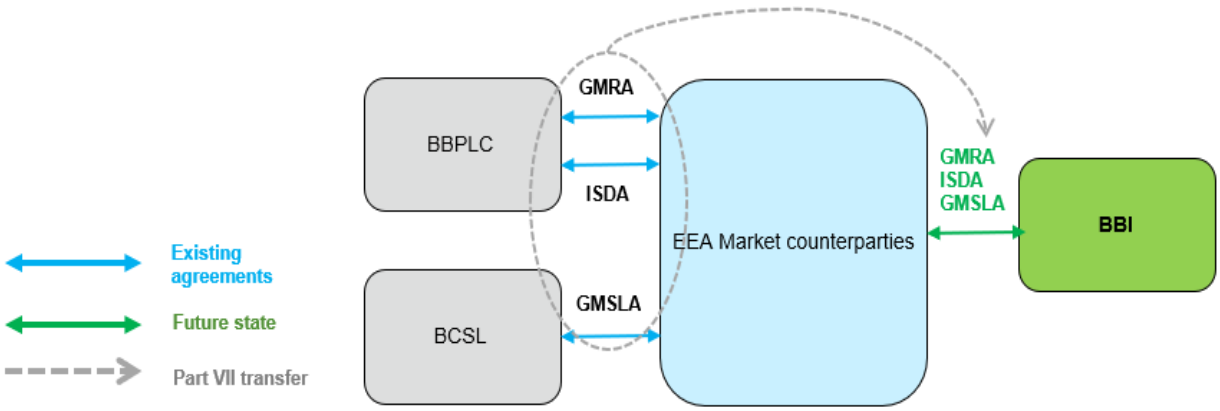
- BBPLC and BCSL currently have Prime Brokerage Agreements ("PBAs") with various clients. Under these agreements, such clients may seek to borrow funds through margin loans (with such loans being secured by securities held by the client). Barclays has a right to rehypothecate those securities for the duration of the loan, which is done through GMRAs between BBBPLC and other market counterparties for fixed income securities and through GMSLAs between BCSL and other market counterparties for equity securities. This ability to rehypothecate allows Barclays to offer the client a more competitive rate to the client on the PBA margin loan.

- A client may also seek to borrow securities from Barclays to support the client's short selling strategies. In this circumstance, Barclays would seek to access the required liquidity for the stock loan through BBPLC's market-facing GMRAs for fixed income securities and BCSL's market-facing GMSLAs for equity securities.

- For example, as at the end of September 2018 one Barclays client held short positions of circa $140mn which required access to securities liquidity and long positions of circa $130mn that required access to margin loans from Barclays to finance the positions.

- Following Brexit, BBI will need to be able to finance such securities through GMSLAs with EEA counterparties. Further, BBI will need to be able to access the required liquidity for stock loans for clients needing to borrow securities, particularly if in the future the liquidity is only available via EEA counterparties (particularly for hard to source 'special' positions). While the PBAs are being transferred to BBI outside of the Scheme, BCSL's GMSLAs would need to duplicate under the Scheme to allow BBI to continue to offer prime brokerage services in respect of equity securities to EEA clients.

Equity Financing

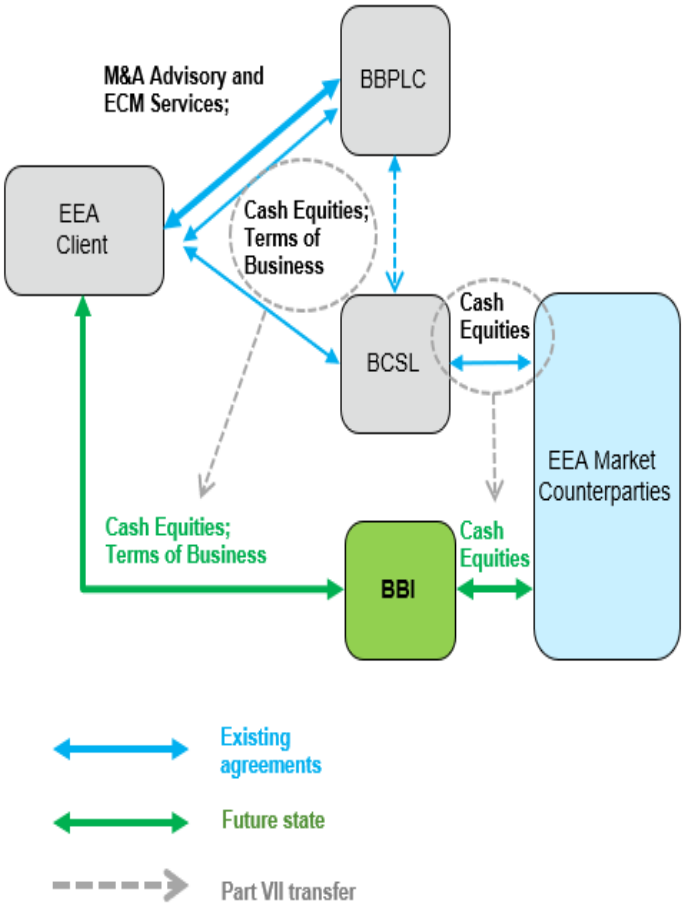


- Barclays currently faces EEA market counterparties for financing across a range of products under a number of different agreements with BBPLC or BCSL. These agreements include GMSLAs with BCSL for equity securities loans, GMRAs with BBPLC for Repurchase or Reverse Repurchase Transactions and ISDA Master Agreements with BBPLC for total return swap ("TRS") transactions. Under these agreements, Barclays may be a receiver or provider of liquidity depending on Barclays' and/or counterparty's supply and demand.

- For example, one EEA market counterparty currently supplies equity securities to BCSL via a GMSLA but is also accessing cash financing from BBPLC under an ISDA Master Agreement via a TRS.

- Following Brexit, Barclays's EEA market counterparties will expect to be able to access the same range of products that are currently accessible. Additionally, a client who has previously entered into a GMRA and/or ISDA Master Agreement pre-Brexit may post-Brexit also wish to enter into a GMSLA as well, so BBI will need the capability to offer the whole range of products and, necessarily, the documents which support them. In order for BBI to have the capability to offer such products to its EEA market counterparties, the current arrangements with BCSL would need to be duplicated with BBI under the Scheme, such that BBI may continue to supply and receive liquidity from the EEA market.

Equity Syndication



- Barclays' EMEA Equity Syndicate Desk facilitates Equity Capital Markets ("ECM") transactions which typically involve raising capital for an issuer or holder of equity or equity-linked securities through a coordinated offering of those securities. Examples include initial public offerings ("IPO"), rights issues and marketed offerings of equity or equity-linked securities.

- BBPLC is counterparty to most ECM transaction documentation (e.g. advisory and underwriting terms) with clients.

- BCSL is counterparty to most clients of Equities for cash (equity and equity-linked) products and is where exchange memberships are held. For this reason most of the operations of execution and settlement of an ECM transaction take place in this entity. Economic risk and/or reward generated in BCSL as a result of ECM transactions is transferred to BBPLC on a daily basis through an agency agreement.

- In connection with an IPO, for example, a client is able to benefit from BCSL's access to market liquidity to allocate such company's shares to investors and/or through syndicate banks involved in the offering. This is achieved through a variety of arrangements including existing Terms of Business and cash equities trading documentation between BCSL and EEA counterparties.

- The above range of activities form part of the same service and are indivisible from the perspective of the client. The suite of documents and service offerings enable Barclays to provide an integrated and seamless service to clients. Following Brexit, Barclays will need to maintain access to the same sources of equities liquidity for clients of BBI. The current arrangements with BCSL would need to be duplicated with BBI under the Scheme to allow BBI to continue to provide EEA clients with access to the same liquidity and services.