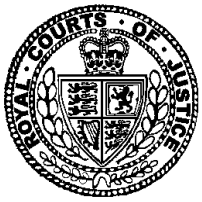

Neutral Citation Number: [2022] EWHC 1673 (Ch)

Case No: CR-2022-000408

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 28th June 2022

Before:

MR. JUSTICE TROWER

- -

Between:

IN THE MATTER OF THE ROYAL LONDON MUTUAL INSURANCE SOCIETY LIMITED

- and -

IN THE MATTER OF PART 26 OF THE COMPANIES ACT 2006

- -

- -

MR. MARTIN MOORE QC and MR. SEAMUS WOODS (instructed by **Pinsent Masons LLP**) appeared on behalf of **The Royal London Mutual Insurance Society Limited**

- -

Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE TROWER:

1. This is an application by The Royal London Mutual Insurance Society Limited ("Royal London") for an order granting permission to convene a meeting of certain of its policyholders for the purpose of considering and, if thought fit, approving a scheme of arrangement ("the Scheme") under Part 26 of the Companies Act 2006 ("CA").

2. The policyholders proposed to be summoned to the meeting are described in the Scheme documentation as the eligible RLMIS Liver policyholders. Their policies were transferred to Royal London by Royal Liver Assurance Limited ("Royal Liver") in 2011 pursuant to an Instrument of Transfer ("IoT") under the Friendly Societies Act 1992.

3. Royal London was itself originally founded as a friendly society, but in 1908 was converted into a private company limited by guarantee without share capital. It is authorised by the Prudential Regulation Authority ("the PRA") and has permission under Part 4A of the Financial Services and Markets Act 2000 ("FSMA") to effect and carry out contracts of long-term insurance in the United Kingdom. It, together with its subsidiaries, form the largest mutual life pensions and investment group in the UK with assets under administration totalling £164 billion, 8.8 million policies in-force and technical provisions of some £106 billion.

4. Since 2000 Royal London has acquired a number of businesses in addition to the business it acquired from Royal Liver in 2011, namely businesses previously conducted by United Friendly Insurance plc, Refuge Assurance plc, The Scottish Life Assurance Company, Scottish Provident International Life Assurance Limited, Phoenix Life Assurance Limited ("PLAL"), Co-operative Insurance Society Limited and Police Mutual Assurance Society Limited. None of the policyholders of the acquired businesses have become members of Royal London.

5. The proposal made by Royal London is to consolidate a ring-fenced closed fund, the Liver Sub-Fund, in which the policies of the eligible RLMIS Liver policyholders have been held since 2011, into the Royal London Open Fund. This Open Fund remains open to new business and like the Liver Sub-Fund and two other closed funds forms part of Royal London's long term fund.

6. Like the other closed funds the Liver Sub-Fund is managed with its own separate capital requirements for the purposes of the UK Solvency II Regime. To the extent that these capital requirements are satisfied by the estates of these closed funds, the with-profits policyholders, except for those ultimately originating from Friends Provident, have an entitlement to distributions from those estates.

7. These entitlements are reflected by an increase in what is called their asset share by an application of a final bonus and sometimes an annual bonus. Another category of policy called a contingent bonus or CP policy is also within the Liver Sub-Fund. Although these CP policies are non-profit, they are also entitled to a distribution from the Liver Sub-Fund Estate based on their CB claims value and, to that end, are uplifted by the same proportion as the asset shares of with-profits policyholders when distributions from the estate are made.

8. If the Scheme is approved and sanctioned, the capital requirements relating to the included RLMIS Liver policies will be assumed by the estate of the Royal London Open Fund. The rights of the existing with-profits and CB policyholders to distributions from the Liver Sub-Fund Estate will be exchanged for an uplift in the value of their policies.

9. This proposal closely resembles those put forward in schemes sanctioned by Sir Alastair Norris in 2021 (*Re The Royal London Mutual Insurance Society Limited* [2021] EWHC 3304 (Ch)) as part of what is called the Royal London legacy simplification programme. Those schemes provided for the assets and policies of three other closed funds to be distributed and allocated to the Royal London Open Fund. These related to two funds established on the acquisition by Royal London of long-term insurance business carried out by United Friendly Insurance plc and one Fund established on the acquisition of business from the Scottish Life Assurance Company. A further aspect of the legacy simplification programme was implemented by a merger of the Refuge Assurance Industrial Branch Sub-Fund with the Royal London Open Fund in June 2021.

10. The proposal for the Scheme is put forward in conjunction with a proposed scheme of arrangement pursuant to Part 9 of the Irish Companies Act 2014 in relation to Royal London Insurance DAC ("RLI DAC"), a designated activity company registered in Ireland. RLI DAC took a transfer of the business originally written in Ireland by Royal Liver or its subsidiaries pursuant to a transfer scheme under Part VII of FSMA implemented as part of Royal London's preparations for Brexit. Royal London has reinsured RLI DAC's obligations in respect of the transferred policies and its liabilities in respect of that reinsurance are allocated to the Liver Sub-Fund. The Scheme and the proposed Irish scheme are interdependent. On 21st June 2022, Quinn J, sitting in the High Court in Ireland, made orders convening a meeting to be held in Dublin on 20th October 2022 for the purpose of approving the Irish scheme, with a sanction hearing proposed for late November 2022.

11. Although RLI DAC is a creditor of Royal London under the terms of the reinsurance agreement, it is not proposed it will be summoned to a scheme meeting but will provide its consent to the terms of the Scheme through an implementation deed. I also understand that RLI DAC intends to apply for an order amending the Part VII transfer scheme pursuant to the liberty to apply provisions contained within the original order. It is proposed that this application will come on for hearing at or about the time of any application to sanction the Scheme.

12. It is also proposed as part of the same phase of Royal London's legacy simplification programme that another with-profits sub-fund, the PLAL Fund, will be merged with the Royal London Open Fund to take effect at the same time as the proposed implementation date for the Scheme. This sub-fund had arisen on Royal London's acquisition of the business of PLAL.

13. One of the underlying reasons for the proposal to be put before policyholders flows from the operation of the IoT in consequence of which the Liver Sub-Fund was constituted. It is one of its terms, commonly known as a "sunset clause" that the Liver Sub-Fund may, or must, be merged with the Royal London Open Fund on the occurrence of one of two threshold events. The first is a discretionary event and arises where the aggregate value of the CB and with-profits policies fall below £296 million,

indexed with RPI. It is expected that, absent the Scheme, this threshold will be reached in 2031. The second is mandatory and arises where the aggregate value of those policies falls below £118 million indexed with RPI. In the absence of the Scheme it is expected that this threshold will be reached in 2041. The effect of the Scheme is therefore to accelerate the occurrence of these thresholds to the implementation date of the Scheme on 31st December 2022.

14. If the Scheme were not to be implemented, the effect of the operation of these threshold provisions would be to benefit a very much smaller constituency of surviving policyholders than would be the case if the Scheme were to approved and sanctioned, because an unduly large proportion of the assets would remain to be distributed at a time when disproportionately fewer policyholders remain to share in that distribution. One of the principal purposes of the Scheme is to smooth out this tontine effect by removing the need for the Liver Sub-Fund estate to continue so as to meet the Liver Sub-Fund's capital requirements. The board of Royal London does not regard this tontine effect to be part of a policyholders' legitimate expectations and considers that the Scheme will give rise to a fairer approach on this issue.

15. Another benefit of the proposal is said by Royal London to be the certainty for policyholders of the distribution of a fixed percentage of the Liver Sub-Fund estate by way of an immediate uplift in the value of their policies. This removes what would otherwise be a level of uncertainty in relation to future distributions which may be regarded as undesirable. As matters currently stand, distributions must be made when there is an excess of the fund's 1 in 20 year capital target but are not allowable below that figure. There is a risk that, as the capital requirements become an increasingly large part of the Liver Sub-Fund, the amounts of distributions to policyholders will become more volatile.

16. A further benefit is that if the Liver Sub-Fund were not to be consolidated at the earlier date contemplated by the Scheme, the costs of the merger that would then occur at some time after 2031 would be less equitably spread over a smaller number of policies. It is also expected that a consolidation of the Liver Sub-Fund and the Royal London Open Fund at this stage will reduce the aggregate capital requirement of the two funds by around £48 million, which will be shared equally between the Liver Sub-Fund and the Royal London Open Fund.

17. It therefore follows that the principal issues for consideration by the policyholders to be summoned to the proposed Scheme meeting are certainty of outcome and the facilitation of tontine smoothing. Their respective views as to the desirability of what Royal London presents as these benefits should be instrumental in informing their vote. The benefits to Royal London also include simplification of its fund structure, cost considerations and the capital requirement reduction flowing from consolidation.

18. As part of the process of designing and implementing the Scheme, Royal London has appointed an independent actuary, Mr. Nick Dumbreck of Milliman LLP (the "IE"). It has appointed another actuary, Ms. Catherine Gavin, as an independent peer reviewer. The terms of the Scheme and its effect have also been considered and reviewed by Royal London's chief actuary and its with-profits actuary. There are also two imbedded advisory committees within the Royal London governance structures, a With-Profits Committee ("WPC") and the Liver Supervisory Committee established in 2011 to

monitor the management of the Liver Sub-Fund. Although the language in which they express themselves differs in accordance with the functions they each fulfil, these professionals and committees have all reached conclusions on the content and implementation of the Scheme which are consistent with the court concluding in due course that it is reasonable, fair and ought to be sanctioned.

19. In reaching his conclusion the IE analysed the capital position of both the Liver Sub-Fund and the Royal London Open Fund. Although this is not the hearing for me to reach any conclusion on the merits or fairness of the Scheme, in a scheme such as this it is to be expected that the work carried out to assess the fairness of the Scheme as part of its design, is a factor which policyholders may wish to take into account when considering how to vote at the Scheme meeting. To that extent, the fact that the IE's report and its conclusions are accessible to policyholders is an important part of the court's function in assessing whether the Scheme is fit to be put the vote.

20. The IE's evidence determined that a number of fairness tests were satisfied. In particular, he concluded that the implementation of the Scheme would not have a material effect on the security of the guaranteed benefits of the policyholders of the Royal London Open Fund, the Liver Sub-Fund or the other Royal London closed funds. He also, perhaps slightly more relevantly for present purposes, concluded that what he called the "policyholders outcomes test" was satisfied. This included his analysis as to the distribution they would receive from the Liver Sub-Fund Estate through enhancements to their with-profits asset shares and the claim amounts under their CB policies. He also concluded that policyholders' reasonable expectations as to the size of the Liver Sub-Fund estate used to determine the appropriate uplift percentage were reflected in the proposal and that the diversification benefits had been reasonably computed and allocated. He also subjected his conclusions on those issues to an analysis of how they might differ under different circumstances or scenarios. He has also considered the means by which Royal London has communicated with its policyholders and the procedures put in place for the purposes of designing the policyholder vote. His report is to be posted on the Scheme website and will enable any policyholders with an interest in the technical detail of the Scheme to gain a greater understanding of its terms and effect.

21. As I have alluded to, these matters are of direct relevance to fairness which will have to be considered in much greater detail at the hearing to sanction the Scheme if it is approved at the Scheme meeting. For present purposes it suffices to say that I have considered his report and am satisfied that it contains a detailed explanation of the way in which the Scheme is structured and demonstrates that there is no obvious roadblock to its sanction in due course. I say no more than that about fairness at this stage because the hearing today is not the time or place to consider those issues.

22. As I said, the essence of the Scheme is to introduce certainty for policyholders now against a more unpredictable outcome later. The means by which this is sought to be achieved is that the existing closed fund (the Liver Sub-Fund) will cease to exist and the policies allocated to it will be allocated to the Royal London Open Fund. An uplift amount will be applied to each RLMIS Liver policy included within the Scheme. This will be calculated at a fixed percentage rate of 23.1%, reflecting the amount expected to be in the estate of the closed fund distributed in proportion to the estimated total value of the relevant asset shares and claimed values of the included RLMIS Liver

policies. The uplift will then be applied to each asset share or CB value as the case may be.

23. The asset share will be calculated as at the proposed implementation date for the Scheme which is 31 December 2022. Where policyholders are still contractually obliged to continue paying premiums after the implementation date, the quantification of their asset share will allow for an uplift that reflects the regular premium amounts to be paid after the implementation date. This is called the "premium uplift".

24. The quid pro quo is that the Scheme provides for what is called a Scheme Contribution to be deducted from the Liver Sub-Fund and paid into the Royal London Open Fund without allocation to the policies included within the uplift. It will comprise three elements.

25. The first element is a closed fund contribution ("CFC") totalling £43.2 million, which is estimated to be 18.6% of the Liver Sub-Fund estate as at the calculation date. This is designed to recognise the extra capital strain borne by the Royal London Open Fund as a result of the consolidation occurring earlier than would otherwise have been the case. It also reflects a diversification benefit expected to be generated by the consolidation of the Liver Sub-Fund and the Royal London Open Fund being one of the benefits said by Royal London to flow from the Scheme.

26. Royal London says that the quantification of the CFC has been the subject matter of extensive internal consideration by its actuarial team including the with-profits actuary and the chief actuary and has been approved by the Royal London board. The evidence is that it is both appropriate and reasonable because, from the perspective of the eligible RLMIS Liver policyholders, the contribution will enable an immediate distribution of the Liver Sub-Fund estate by way of uplift to their eligible benefits. Although it amounts to a substantial proportion of the Liver Sub-Fund estate, the IE has concluded that the long tail nature of the risks covered by the capital contribution into the Royal London Open Fund provides a justifiable explanation.

27. The second element is what is called a project cost allowance which represents an appropriate share of the overall costs associated with Royal London's programme to consolidate its various closed funds. This allowance is calculated to be £7.2 million, estimated to be 3.1% of the Liver Sub-Fund estate as at the calculation date. This allocation is said by the IE to be reasonable.

28. The third element is the payment uplift contribution reflecting the application of the premium uplifts I have already described. This is calculated at £3.3 million and is estimated to be 1.4% of the Liver Sub-Fund estate as at the calculation date. The IE's evidence is that it is inclusion in the terms of the Scheme is reasonable and that it is reasonable that it was calculated on a best estimate basis.

29. The total amount of the Scheme Contribution in the current case is higher than the scheme contributions made in the earlier schemes that have already been sanctioned as a part of Royal London's legacy simplification programme. The reason for this is explained in the evidence but, in broad terms, flows from the significant long tail risks within the Liver Sub-Funds which means that the responsibility for meeting those risks requires an extended period of time within which capital has to be committed.

30. Some of the policies allocated to the Liver Sub-Fund have been excluded on the grounds that they are classified as "heavily in the money". These are policies with guarantees attached and, as a result of the benefits payable in connection with the guarantee applicable to the policy, they are not expected as at the date of claim to be increased in any way by the application of the uplift and premium uplift. The consequence is that the relevant policyholders have no interest in the exchange of rights affected by the Scheme and the uplifts will be notionally applied to those policies without recourse to the Liver Sub-Fund estate. There are 713 of these policies with asset shares of just over £2 million as at the calculation date, amounting to 0.29% in number and 0.46% in value of the asset shares of the total constituency of with-profits policies. They will transfer to the Royal London Open Fund by operation of the threshold provisions contained in the 2011 IoT.

31. There are a number of other policyholders whose policies are allocated to the Liver Sub-Fund but who are excluded from the Scheme. They are policies originating from Friends Provident and non with-profits policies other than the CB policies. They also will transfer over by reason of the operation of the threshold provisions contained in the IoT. In my view there are good commercial reasons for the exclusion of these policyholders from the Scheme as well as those "heavily in the money". The test identified by the Court of Appeal in *Sea Assets v Garuda* [2001] EWCA Civ 1696 is met.

32. The role of the court on an application to convene meetings of creditors for the purposes of considering and, if thought fit, approving the Scheme is well established. It is not concerned, as I have already indicated, with any issue that goes to the merits or fairness of the Scheme. As is made clear by the Practice Statement dated 26 June 2020, the court is concerned with matters relating to jurisdiction, including any issues that might arise relating to the constitution of the class meeting and any other issues not going to the merits or fairness of the Scheme but which might lead the court to refuse to sanction it in due course.

33. For these purposes, the Practice Statement provides that, where an application is made to convene a scheme meeting gives rise to any of the issues I have mentioned, the applicant is required to take all steps reasonably open to it to notify any person affected by the Scheme that it has been promoted, the purpose which it is designed to achieve and its effects, the meeting or meetings of creditors which the applicant considers will be required and their composition. Notification is also required of the date and place fixed for the convening hearing, that they are entitled to attend the hearing and details of how further enquiries can be made about the scheme.

34. To that end Royal London has engaged in what is called an appetite mailing process that was carried out under the supervision of the WPC. It did so after consulting with Royal London's chief actuary, the with-profits actuary and the FCA. This process included the transmission to all relevant policyholders of a covering letter, a booklet explaining the proposal and the legal process, a leaflet describing how policyholders' with-profits policies and CB policies work and a feedback form. This information was circulated to policyholders during February and March 2022 and publicity as to its existence was given by advertisements posted in a number of national daily newspapers.

35. The appetite mailing included notification that this convening hearing had been provisionally booked for today, 28 June 2022, and that the policyholders were entitled to attend to present their views to the court. Royal London informed its policyholders in the appetite mailing that they would inform the court at this hearing of the feedback they received including any objections to the Scheme and, in particular, how they were able to complete the feedback form if they disagreed with Royal London's proposal in relation to class composition. Royal London also has had in place a call centre since 14th February 2022 which it proposes to keep operational until after the implementation date of the Scheme.

36. Like Sir Alastair Norris in the judgment he gave on the convening application for the three former schemes (see [2021] EWHC 2133 (Ch) at [33]), I have read the relevant documents. They are in plain language. They are attractively formatted and they are clearly structured. It is plain to me that conscientious efforts have been made to engage with the constituency to which the mailings and advertisements are addressed. Furthermore, as they did before Sir Alastair Norris, the documents included in the appetite mailing have prompted significant response. The response rate has been described in the evidence as encouraging in that as at the beginning of May more than 20,000 responses had been received of which more than 87% by policy value was supportive of the Scheme.

37. Although no objecting policyholders have attended this hearing to make representations to the court, the evidence is that as at 13th June 2022, 10 objections had been received. In accordance with what was said in the mailing, I have been taken through each of those objections by Mr. Moore QC, who appears for Royal London. Having considered them all, I am satisfied that they all go to the fairness of the Scheme. None of them raised issues that went to class composition or, subject to one point, to issues that arise for determination today. The only exception is that two of the objectors complained that they had received the mailing sometime after the time at which they were requested to submit their comments. The evidence is that the reason for their late receipt was that it was initially thought that the policyholders concerned may have fallen into the excluded "heavily in the money" category, but it then transpired for market-driven reasons that they no longer did. Accordingly, the mailing sent to those policyholders were received by them late but there was no change to the date for comment. In the event, I am satisfied that the objectors concerned received the materials in sufficient time for them to express their views. They did so, and I have been able to consider what they wished to say.

38. In my view, the steps taken by Royal London amounted to sufficient compliance with the requirements of paragraph 7 of the Practice Statement. They comprised an adequate and satisfactory policyholder notification process for the purposes of this convening hearing.

39. Turning then to the substantive issues, there is no question that Royal London is a company within the meaning of Part 26 of CA, and there are no cross-border issues that arise in relation to the sanction of the Scheme. To that extent the court's jurisdiction to grant the relief sought is established.

40. In the skeleton argument prepared in support of the application and in his oral submissions, Mr. Moore divided the other issues for determination into five categories.

The first related to the question of whether it was appropriate to convene a single class meeting. The second related to whether the Scheme would involve any reattribution of the underlying inherited estate (the Liver Sub-Fund estate) so as to give rise to an obligation under Chapter 20 of the FCA's Conduct of Business Source Book ("COBS") to take a number of steps including the appointment of a policyholder advocate to assess the proposals. The third is whether the terms on which the eligible RLMIS Liver policies were transferred to Royal London in 2011 or the arrangements that were made at the time of the transfer to RLI DAC under Part VII of FSMA represent a jurisdictional roadblock to the sanctioning of the Scheme in due course. The fourth is whether Royal London's proposals for convening the meetings are appropriate. The fifth is whether Royal London's other proposals for the conduct of the meeting are appropriate.

41. Dealing first with class, the question of whether separate classes of scheme creditor are required to be held for the purpose of considering whether or not to approve a scheme of arrangement under part 26 of CA is determined by reference to the well-known test of whether their rights are so dissimilar as to make it impossible for them to consult together with a view to their common interest: *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573, 583. In answering that question the court is required to analyse the rights which are to be released or varied under the scheme and compare them with the new rights which the scheme gives by way of compromise or arrangement to those whose rights are to be released or varied: *Re Hawk Insurance Company Limited* [2001] 2 BCLC 48 at [30].

42. In carrying out this analysis the court is concerned with rights not interests. A similarity of rights, but a dissimilarity of commercial interests, does not affect the issue of class constitution although it may well become relevant to the exercise of the court's discretion to sanction the scheme in due course. That is not a matter though with which the court is concerned at the convening hearing. The fact there may be some differences between the rights of creditors does not mean that they must be placed in separate classes for the purposes of considering a scheme either. As David Richards J explained in *Re Telewest Communications (No. 1)* [2005] 1 BCLC 752 at [37]:

> "... a broad approach is taken and … the differences may be material, certainly more than de minimis, without leading to separate classes."

43. Furthermore, the breadth of the approach to be taken means that the court will not look at the scheme in isolation from other arrangements entered into collaterally with the scheme: see by way of example the decision of Zacaroli J in an earlier application by Royal London to convene meetings of creditors who were policyholders of its Scottish Life Fund: *Re The Royal London Mutual Insurance Society Limited* [2018] EWHC 2215 (Ch) at [16].

44. There are a number of differences between the policies held within the Liver Sub-Fund. Therefore, the question for the court is whether they give rise to such dissimilarities in rights that it is impossible for different groups to consult together with a view to their common interest.

45. The first dissimilarity which needs to be considered relates to the difference between the rights of CB policyholders and the rights of with-profits policyholders. A CB policy makes provision for the payment of a fixed sum assured on maturity. It also has what

is called a CB claim value which entitles the policyholder to participate in a discretionary distribution from the Liver Sub-Fund estate payable by the addition of a final bonus in accordance with the IoT entered into the time of the Royal Liver acquisition in 2011. A with-profits policy has a guaranteed minimum value at maturity, but also an asset share which entitles the policyholder to participate in a discretionary distribution, payable in the form of a final bonus but based on profits arising from the Liver Sub-Fund business.

46. The valuation of a policyholder's existing rights as reflected in these two categories of policy is therefore calculated in a slightly different manner. The process of arriving at a CB claim value is different from the process of arriving at an asset share. However, crucially, the right to a distribution from the Liver Sub-Fund estate is effectively the same whether the policyholder holds a with-profits or a CB policy because the distribution on the asset share of a with-profits policy and the claim value of a CB policy is calculated in the same manner. The uplift under the Scheme is uniform and will also be calculated and applied consistently between the two categories of policy. In short, all eligible RLMIS Liver policyholders have received, and under the Scheme will receive, distributions out of the Liver Sub-Fund estate at the same rate.

47. It follows that in my view there is no material difference as between the with-profits policies and the CB policies in the rights that are to be varied. Nor in my view is there any material difference in the ultimate question which all policyholders have to consider, whether they are with-profits policyholders or CB policyholders. That question is the same for all of them: do they wish to accept the terms on which the exchange of certainty now for an uncertain future return is being offered, in circumstances in which the application of the uplift to which they are entitled under those terms will be uniformly applied to the existing value of their policy, whether it be a CB policy or a with-profits policy. For that relatively straightforward reason, it seems to me that they can consult together with a view to their common interest.

48. Do the demographics affect the position? Generally speaking, demographics do not have an effect on class constitution. They give rise to or reflect differences in the personal position of individual policyholders which may affect the extent to which they approach the proposal with favour or distaste. They do not of themselves affect the nature of the right against the company concerned and give rise to a classic example of a difference in interest not rights.

49. Is there anything about the differences between CB policyholders and with-profits policyholders that might impel a different conclusion? The reason this question needs to be asked is because there are a number of factors which, looked at together, indicate that the constituency of with-profits policyholders and the constituency of CB policyholders has a different profile. Thus the evidence as to the number and value of with-profits policies as compared to CB policies shows that the former are, on average, materially more valuable but that there are materially more by number of the latter and the figures are relatively striking. Furthermore, the CB policies have a higher average age than the with-profits policies and the constituency as a whole is likely to have a higher level of untraceable policyholders.

50. On this aspect of the case it is worth side-tracking (albeit briefly) on reasonableness and fairness if only to contrast what is in issue today and what might be said at the sanction

hearing. One of the questions to which the demographics gives rise is whether the difference I have identified might give rise to unfairness in circumstances in which eligible RLMIS Liver policyholders with short remaining terms are projected to receive a higher distribution of the Liver Sub-Fund estate under the Scheme than they would have done absent the Scheme, while the reverse is the case for those with longer remaining terms. I summarise the issue not for the purpose of expressing a conclusion on it today but to describe the extent to which the policyholders can be reassured that the professionals who have designed the Scheme have had regard to its impact when considering the right way forward.

51. The evidence on demographics in this context has been analysed by the IE and the way that he has described the position is that, in the absence of the Scheme, those with longer remaining terms would be more likely to benefit from a larger tontine effect. However, (like the Royal London board as to which see above), the IE was also of the view that the expectation to receive a tontine should not form part of a policyholder's reasonable benefit expectations. This view reflects the point that was discussed by Zacaroli J in *Re Equitable Life Assurance Society* [2019] EWHC 3336 (Ch) where he said the following in two different passages. First:

> "... I consider that Equitable is indeed facing a problem that requires a solution – namely the emergence of a tontine which can properly be characterised as leading to an unfair distribution of capital among remaining policyholders. The FCA, whose statutory objectives include securing an appropriate degree of protection for consumers and ensuring that the relevant markets function well, is of the view that a tontine is not a desirable outcome and should not form part of policyholders' reasonable expectations." [39]

> "The short answer to this [policyholder] objection is that I am persuaded that the tontine effect and increasing cost inefficiencies of allowing the Equitable to continue in run-off provides a good and sufficient reason for the Scheme. Mr. Coxon [the objector] says that the tontine effect is merely part and parcel of his contract and should be respected. I do not accept this, and am fortified in that conclusion by the view of the FCA, with its statutory obligation to protect the interests of consumers, that the tontine is not something that forms part of the reasonable expectations of policyholders." [109]

52. It appears that it may well be possible to say the same about the position of Royal London. In my view, however, none of these considerations affect in any material way the underlying question for today which is whether the policyholders' rights, (either as existing or as varied by the Scheme), are sufficiently different to require separate class meetings. The evidence as to the policyholder profile does no more than indicate that there may be a greater proportion of one category of policyholder which will be influenced to vote for or against the Scheme in accordance with the considerations that affect them personally, such as their lifestyle, their individual risk appetite and their age.

53. These kind of considerations are classic examples of the difference between rights and interests. The economic outcome of existing rights and the economic outcome of substituted rights may well vary with age and other demographics. However that is a consequence not of a difference between the rights themselves but of the difference in outcome of the application of existing and different rights to individuals with different personal characteristics. Established principle demonstrates that such differences do not give rise to class issues. Indeed it would cause near insuperable problems if they did, not least because it would be wrong for the court to speculate on a jurisdiction issue as to how a policyholder's difference in personal interest might manifest itself in his vote. It may be, for example, that even older policyholders might prefer greater uncertainty in the expectation that they would live longer than others and receive the possibility of a better distribution when there are fewer policyholders left than they would receive by application of the uplifts proposed by the Scheme. That is a matter on which it is simply not possible for the court to express a view at this stage.

54. In any event, I agree with Royal London's submission that these considerations are ultimately incidental to the fundamental question which confronts every policyholder, namely, whether they wish to give up the amount of the Scheme Contribution that will be deducted from the Liver Sub-Fund estate in exchange for certainty about the level of distribution they will receive from the estate when 23.1% is allocated to their policy on the implementation date. Because the methodology used to calculate that uplift is the same for all policies and will be applied consistently, I agree that it is, on the face of it, the same question for all policyholders whether they hold a with-profits policy or a CB policy and that is the case even though the policyholder profile is different when looking at the CB policies and the with-profits policyholders as a whole.

55. In my view, very similar answers can also be given in relation to the other differences between different categories of policy. So far as these differences are concerned, I draw comfort from the fact that, in his judgment on the convening hearing in relation to the earlier legacy simplification programme schemes ([2021] EWHC 2133 (Ch)), Sir Alastair Norris reached the same conclusion. He identified a number of heads of generic and scheme-specific tensions between different types of policy, some of which are also present in the current case, but none of which he considered might be capable of giving rise to a class issue.

56. The first relevant one relates to the difference between life and pensions policies. Of the eligible RLMIS Liver with-profits policies just over 12,000 are life policies and just over 17,500 are pension policies. The former have an aggregate asset share of £39 million and the latter have an aggregate asset share of £399 million. Of course the life policies pay out on death or maturity and the pension policies pay out on retirement. But the differences between them relate to the payment of premium, the use of the premium on the occurrence of the relevant event and the administration of the policies. They do not relate to differences in rights and entitlement to distribution of the Liver Sub-Fund estate which is the issue with which the Scheme is concerned. For that reason the differences do not fracture the class.

57. The second distinct category relates to the difference between whole of life and endowment policies. It is possible that policyholders may have a different perception as to the benefits of the Scheme based on the fact that endowment policies pay out at maturity or earlier death, whereas whole life policies pay out only on death. It might

therefore be said that an endowment policy provides for greater existing certainty than a whole life policy. That may be the case but I accept the submission of Royal London that, while endowment policies may have greater certainty as to when their policy will pay out, they have no more certainty than the holders of whole of life policies as to the amount they will receive by way of distribution from the Liver Sub-Fund estate which is the real issue with which the Scheme is concerned. For that similar reason, therefore, this difference does not give rise to a class issue.

58. Another difference relates to the distinction between conventional with-profits policies, of which there are some 6,884 in the Liver Sub-Fund, and unitised with-profits policies of which there are 18,500 in the Liver Sub-Fund. Here again, in my view, the answer is the same. The uplift to be applied under the terms of the Scheme will apply to the asset shares of both categories of policy in the same way with the consequential increase in the value of each policyholder's asset share. The differences that there are flow from the nature of the underlying policy which gives rise to the value of the relevant asset share. On determination of that value the Scheme operates to apply the uplift in a consistent manner.

59. The same conclusion is also appropriate in relation to those eligible RLMIS Liver pension policies which have the benefit of a guaranteed annuity rate. The effect of the Scheme is simply to increase the amount of money that is accumulated under their policy for the purpose of quantifying the annual annuity to which they are entitled under the guarantee. That simply reflects the value of the policy as at the implementation date and does not give rise to an inability to consult with the other eligible RLMIS Liver policyholders in relation to the quantification or application of their interest in the Liver Sub-Fund estate.

60. Another category of policyholder is those who have the benefit of guarantees but not to the same extent as the policyholders who qualify as "heavily in the money" and are thereby excluded. The impact of the Scheme might be said to be different for them from others because the effect of the guarantee may in real terms only see their included RLMIS Liver policy increase in value by a small amount in excess of the guarantee. Because of the existence of the guarantee their entitlement to a 23.1% uplift does not have the same effect for them as it would do for those who do not have the benefit of the guarantee. It might be said that they, therefore, are considering a different question from the question with which the other eligible RLMIS Liver policyholders are concerned.

61. At first blush there might be thought to be a little more force in that analysis. But it seems to me that the short answer is that the existence of the guarantee gives rise not to a difference in rights but to a difference in the outcome and working out of those rights. This was certainly the view of Sir Alastair Norris in the convening judgment he gave at [2021] EWHC 2133 (Ch) at [48] and I agree with him. The question for all policyholders is essentially the same. It is not whether the effect of the uplift has the same economic impact on their rights but rather whether the considerations of certainty, tontine smoothing, and cost minimisation persuade them to vote in favour or against the Scheme.

62. The essence of the same point deals with the other categories of difference identified by Royal London and addressed in the evidence in support of the application. Those

differences relate to policies with periodic payments, bonus entitlements and the right to effect switches. The evidence also addressed distinctions between single and jointly held benefits. In my view the answer in each case is the same. Such differences as there are do not relate to differences in policyholders' rights and entitlement to distribution of the Liver Sub-Fund estate. They relate only to differences in the terms which govern the extent of the entitlement without regard to questions of how the estate is distributed.

63. For these reasons I am satisfied that it is appropriate for a single class meeting to be held and I will so direct. In reaching that conclusion, I reiterate that Sir Alastair Norris reached similar conclusions in relation to the previous schemes on nearly all of those points (which I should in any event follow). I am also comforted by the fact that the IE has reached the same conclusion having done so with the benefit of advice from his own solicitors and that the Regulators do not object to Royal London proceeding on that basis.

64. The next question which I consider much more shortly is the reattribution issue which arises in the following way. Reattribution of a with-profits fund's inherited estate is the process under which a firm which carries on with-profits business seeks to redefine the rights and interests that the with-profits policyholders have over the inherited estate (see the applicable definition of "reattribution" in the Glossary to the FCA Handbook). In such circumstances Chapter 20 of COBS (and in particular COBS 20.2.42 R to COBS 20.2.52 G) requires a firm to follow a procedure including the appointment of a policyholder advocate to represent the interests of relevant policyholders, the appointment of a reattribution expert to assess the proposals and allowing policyholders to accept the proposals on an individual basis or vote on them.

65. Royal London has received advice from its solicitors that the Scheme Contribution does not constitute a redefinition of the rights and interests that policyholders have over the inherited estate for the purposes of COBS 20. In summary, the advice is to the effect that the making of the Scheme Contribution is not a redefinition or reallocation of rights and interests because it is intended to distribute the inherited estate in accordance with the existing rights. In particular the fixed percentage uplift represents a more equitable distribution of the estate than will arise pursuant to the operation of the tontine.

66. They have also advised that the process by which the Scheme has been designed includes thorough independent scrutiny, including scrutiny by the IE (who has himself received independent legal advice) which reaches the conclusion that the advice received by Royal London is sufficiently robust for it to proceed on the basis that there is no reattribution. It is also relevant that the FCA has reviewed Royal London's legal advice on this issue and does not object to Royal London's interpretation that the Scheme involves no reattribution.

67. I am not asked to grant declaratory relief in relation to this issue, but I am able to say that I am satisfied that the Scheme can proceed on the basis that the reattribution issue will not prevent the sanction of the proposed Scheme in due course. Based on the material that I have seen, I consider that the proposed reallocation is in line with existing rights and does not therefore constitute a reattribution. In reaching that conclusion, I propose to follow what Sir Alastair Norris said in the convening judgment

he gave at [2021] EWHC 2133 (Ch) at [59], both because I should follow his conclusion unless convinced that it is wrong and because I do in any event agree with it:

> "I accept the submission that what is being undertaken here is not a "reattribution". On the contrary, the proposed reallocation is in line with existing rights. It is simply an earlier implementation of the Sunset Provisions and that implementation is consistent with what would take place at that ultimate consolidation. I am relieved to see that this is also the view of Mr. Gillespie. Moreover, it is also the view of the FCA, the regulator whose duty it is to oversee compliance with COBS 20."

68. The next issue is the prior instruments issue. This issue is concerned with the question of whether the terms of the IoT, the Liver reinsurance agreement or the RLI DAC Part VII transfer scheme and the need to amend them, present any roadblock to the proposed Scheme. I do not see that they do. The changes that are required to be implemented by the Scheme and the RLI DAC Scheme in Ireland give rise to variations in rights which it is open to Royal London to seek to achieve through the legal mechanisms it has identified. It seems to me that whether or not it achieves those variations depends more on the proper operation of the relevant Scheme than it does on the source of the original right.

69. There will be a consistency of approach in the Scheme, the Irish Scheme and the application being made to amend the Part VII transfer scheme. As matters presently stand, it does not seem to me there is any inconsistency between these various processes. Ultimately, I think it is a matter for the sanction hearing as to whether or not that is correct. But I am satisfied that there would not appear to be any roadblock to the sanction of the Scheme erected either by the original prior instruments themselves or the procedural and mechanistic need for these additional processes to be implemented. There is no reason to think that for that reason there is no value in convening the Scheme meetings sought today.

70. The final issue relates to the convening and conduct of the meetings. There is very detailed evidence as to the extensive process for validating addresses for the purposes of convening the Scheme meetings. I am satisfied from that evidence that Royal London has taken reasonable steps to identify those policyholders to whom the Scheme documents including voting packs are to be sent. I am also satisfied that the directions sought in relation to the treatment of assignees, donees under a power of attorney, trustees in bankruptcy and eligible RLMIS Liver policyholders who are minors are appropriate.

71. One further issue arises out of the definition of eligible RLMIS Liver policyholders. They are defined by the Scheme as holders of a with-profits or CB policy allocated to the Liver Sub-Fund which is not excluded and (a) which will not have reached its scheduled maturity prior to 31 December 2022 (b) which has not been claimed or come into payment in full on maturity, retirement, surrender, transfer or death and (c) in respect of which the policyholder has not ceased to be entitled to receive benefits.

72. There is one category of policyholder potentially falling within this definition, but to whom it is not proposed to send the Scheme documents. This category comprises

policyholders who, according to the limited data retained by Royal London, hold policies in respect of which the life covered would be aged 105 or over if they were still to be alive. If not excluded by the definition mentioned above, they are capable of qualifying as an eligible RLMIS Liver policyholder. However, it is said that it would be unreasonable and disproportionate to send out the relevant documentation in accordance with Royal London's records, because those records indicate that there is a sizeable cohort of policies that would fall into this category (74,000 policies held by 53,000 policyholders), while from a statistical perspective it is impossible for that to be the case because no more than a handful of such policyholders will still be alive. The reason for this is that there are only about 790 over-105-year-olds in the whole of the UK. Because of the way that the policies were originally sold, including on a door-to-door basis over a lengthy period beginning in c.1900, the Royal London recorded data has not kept track of which of its lives covered and policyholders have died over time.

73. I agree with Royal London's proposal on this point. I am satisfied that it would be neither reasonable nor proportionate for the Scheme documentation, including the explanatory booklet and voting packs, to be sent to policyholders aged 105 years or older.

74. I am also satisfied that the arrangements that have been made for the holding of a hybrid physical and virtual meeting in a room at the Holiday Inn in Liverpool with a capacity of 600 people are appropriate. The suitability of the venue has been assessed taking into account the fact that the meeting is a hybrid meeting, the turnout usually seen at Royal London's AGM and the response to the earlier legacy simplification programme scheme meetings held in 2021. I am also satisfied that the time between the sending out of the Scheme documentation including the explanatory statement, namely, a six-week period commencing on 17th August 2022, the proposals for advertising and the date proposed for the Scheme meeting on 11th November 2022 are all appropriate.

75. I have also considered the other arrangements for the holding of the Scheme meeting including, in particular, the mechanism for valuing votes described in more detail by the IE. He explained that they were proposed to be the transfer value for pension policies, the cash-in value for endowment policies and the death value for life policies. This approach is reflected in the draft order and in my view is an appropriate one to be adopted when determining the value of the Scheme votes.

76. The court is also required by paragraph 15 of the Practice Statement to give consideration at the convening hearing to the adequacy of the explanatory statement. It must be satisfied that it is in an appropriate form, although it will not approve the document. It will remain open to any person affected by the Scheme to raise issues in relation to its adequacy at the sanction hearing. In the present case the explanatory statement takes the form of an explanatory booklet to be sent to all included RLMIS Liver policyholders. In my view the form which it takes is appropriate to the nature of the Scheme and appears to comply with the statutory requirements.

77. I am satisfied that the proposal to order that it be sent to each of the eligible RLMIS Liver policyholders at their registered or last known address together with a voting form and personalised illustration (both of which I have also been taken to by Mr. Moore) is an appropriate means of ensuring that policyholders have sufficient information to enable them to vote and the means to do so.

78. Finally, I should make clear that both the FCA and the PRA have been closely involved in the proposals which are to be put before policyholders at the Scheme meeting. Both of the regulators have expressed the view that they do not object to the directions sought today and do not object to Royal London's conclusion that a single class meeting should be convened. The question of whether or not such directions should be given is ultimately a matter for the court but I take comfort from the conclusions they have reached in the views that I have expressed.

(For continuation of proceedings: please see separate transcript)

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