IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
[2022] EWHC 1796 (Ch)

No. CR-2021-002127

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday 15 June 2022

Before:

MR JUSTICE TROWER

IN THE MATTER OF: **PHOENIX LIFE LIMITED, REASSURE LIFE LIMITED, AND PHOENIX LIFE ASSURANCE EUROPE DESIGNATED ACTIVITY COMPANY**

MR M. MOORE QC appeared on behalf of the Applicants.

MR D. SIMPSON appeared on behalf of the PRA and the FCA.

J U D G M E N T

(via Microsoft Teams)

(Transcript prepared without the aid of documentation)

MR JUSTICE TROWER:

1 The matter with which this application is concerned arises in proceedings seeking the sanction under s.111 of the Financial Services and Markets Act 2000 ("FSMA") of an insurance business transfer scheme ("the Scheme") being promoted to ameliorate the consequences of Brexit for certain of the policyholders of Phoenix Life Limited and Reassure Life Limited.

2 Although the Scheme itself has been under consideration for some time, the proceedings have come before the court at a very early stage. The claim form was only issued on 10 June and the current timetable is that it is hoped that the hearing for directions can be listed before an ICC judge in early July 2022. A sanction hearing is currently scheduled for 18 October 2022.

3 One of the consequences of this is that although I have had the benefit of submissions made on behalf of the FCA and the PRA by Mr David Simpson, as well as submissions from the applicants by Mr Martin Moore QC, no policyholder or other person who may allege that they would be adversely affected by the carrying out of the Scheme has been notified of the application and none appear in their own right or by a legal representative.

4 The relief now sought in the draft order prepared for the purposes of today's application tracks the declaration sought in para.9.1 of the claim form but takes in its introductory words a slightly different form. Instead of a declaration, the applicants seek an order that the court considers that, without prejudice to any submissions to the contrary by any person claiming at the sanction hearing to be adversely affected by the scheme, the Scheme is a transitional insurance business transfer scheme within the meaning of Part 7 of FSMA as amended by Regulation 36 of and the schedule to The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (as amended) ("the 2019 Regulations"), notwithstanding that:

(1) the Scheme has an effective date after 31 December 2022; and

(2) orders are made after 31 December 2022 further to the order sanctioning the Scheme under s.111 of FSMA, under s.112 of FSMA and generally provided, in each case, that the order sanctioning the scheme under s.111 of FSMA is made on or before 31 December 2022.

5 The question raised by this application therefore relates to the court's jurisdiction to make an order sanctioning the scheme in the circumstances identified in the claim form. As I shall explain, the determination of that question depends on a short point of statutory construction of para.2 in the Schedule to the 2019 Regulations.

6 Before turning to the issue itself, there is a preliminary point with which I should deal. Although this is not the substantive hearing of the application for sanction, the applicants' evidence contemplated that I should grapple at this hearing with the question relating to the court's jurisdiction not just for the purpose of determining whether it is appropriate for the proceedings to continue but, rather, for the purpose of declaring the court does, indeed, have jurisdiction. At first blush, this would amount to a final determination binding on all parties with a legitimate interest in the proceedings.

7 However, in his skeleton argument in support of the application, Mr Moore had said that the applicants accept that it would be open to a policyholder to argue at the sanction hearing that any conclusion I may have reached on the point of construction was wrong and the form of

order sought now makes plain that their right to do so, if so advised, will subsist. Mr Moore went on to say that the applicants considered that the likelihood of a policyholder wishing to object on jurisdiction alone is vanishingly low but that in terms of risk mitigation it is appropriate to raise the issue at this stage of the proceedings.

8 In my view, Mr Moore was correct to accept that it would be wrong to grant at this stage a declaration purporting to be binding on policyholders. The stage has not yet been reached at which they have been able to exercise their rights under s.110 of FSMA to appear and advance such arguments as they see fit as to why the court should not sanction the scheme. This may include points on jurisdiction. They may wish to do so either as a freestanding point or in conjunction with other arguments on the substance of what is proposed. In short, however firm the view reached by the court as to the obvious merits of the point on which the applicants seek declaratory relief, and however unlikely it may be that a policyholder will attempt to take the point at sanction, it would run contrary to the rights granted by the statute (and, indeed, offend fairly elementary principles of justice) to grant final relief on an issue going to the question of whether the scheme could or should be sanctioned without giving policyholders the opportunity to be heard.

9 On one view, this might be thought to mean that it is too early for the court to grant any relief at all, but in considering whether or not that is the correct approach, I have had regard to the judgment of Sir Geoffrey Vos C, sitting with Snowden J, on an application for prospective guidance concerning the ringfencing transfer schemes proposed in relation to the UK's major deposit-taking banks (*Re Barclays Bank PLC and others* [2017] EWHC 1482 (Ch)). In that instance, the application was made before it was possible for the banks to make formal applications for sanction but detailed directions were sought as to how the proceedings ought to be progressed. The Chancellor said this in his judgment at [8]:

> "It goes without saying that the court will give such assistance as it can in cases of this kind to ensure that the applications proceed expeditiously and efficiently, and that all necessary parties are heard, and that the issues are resolved and concluded within the statutory timetable. It is nonetheless important for the parties, and all those affected by the [ringfencing transfer schemes] with which we are concerned, to understand that the directions which the court will give at this stage are given on the information currently available to the court. They are not to be regarded as set in stone. They are necessarily subject to any further directions and orders that the court may make in the individual application for each bank. That is especially true because although the hearing before us has been attended by counsel for the banks and for the Regulators (the FCA and the PRA), the hearing has not been notified to consumers, customers or stakeholders, or to others who may be affected, nor even to representatives of such groups. Such people, therefore, have had no opportunity to make representations concerning the process which is to be adopted."

This was said in the context of detailed procedural directions, but they were capable of affecting substantive rights particularly in relation to questions of notification and the like.

10 This approach was then considered by Norris J in *Re Certain of the Members at Lloyd's and Lloyd's Insurance Company SA* [2018] EWHC 3228 (Ch) in which the court was asked to give prospective guidance on a number of points which went to the question of whether or

not the proposed scheme in that case was capable of being sanctioned in due course, or, as it was put in the application, whether it was "fit for consideration". Norris J explained that while the court does not issue advisory opinions and will not, save in very rare circumstances, answer hypothetical questions, it still has an inherent jurisdiction to express provisional views to assist in case preparation so long as that does not restrict the scope or nature of any final order.

11 In reviewing the law in this area, Norris J accepted that the decision of Sir Geoffrey Vos C and Snowden J reflected a willingness by the court to give prospective guidance to assist in ensuring that the applications for business transfer orders could proceed expeditiously and efficiently, that all necessary parties are heard, and the issue was resolved when concluded within the statutory timetable. Nonetheless, Norris J at [37] and [38] of his judgment explained that when the court is considering taking this approach it must proceed with caution. The court itself does not have an interest in the outcome of any application for sanction. Its task is to subject what is eventually submitted for sanction to entirely independent scrutiny. As he put it:

> "Any 'provisional view' expressed exerts a subtle formative influence as the application proceeds."

12 For that reason, he preferred to analyse the issue before him as being whether on the material presently before the court, the proposed courses of action are obviously incapable of satisfying some criteria and established by statute or authority, or whether even at this early stage in the journey it is apparent that there is a roadblock.

13 In my view, there is force in Norris J's injunction that the court should proceed with caution, more especially where the court is being asked to express views about the design of the scheme. On one view, if the point is very clear relief is unnecessary, while if there is any doubt care must be taken before introducing the subtle formative influence on the ability of policyholder opponents to advance arguments in due course for the reasons explained by him. However, I also think that the court must be careful not to adopt too inflexible an approach, more particularly where a scheme is one in which preplanning has particular sensitivities and the issue goes to a pure point of jurisdiction. To do so would be inconsistent with the policy reflected in the decision of Sir Geoffrey Vos and Snowden J that it may be appropriate for case management reasons in business transfer schemes faced with the kinds of timing pressure which arise in the present case for the court to accede to an applicant's request to consider and give a provisional ruling on a point that, while procedural in form, is capable of affecting policyholders' substantive rights. This may be so even where not all parties who might wish to allege that they would be adversely affected by their carrying out of the scheme have not had an opportunity to be heard and where the court has not heard adversarial argument on the point.

14 Despite what he said about caution, I do not think that Norris J, would have disagreed with that formulation. In his judgment in the *Lloyd's* case, he also referred with approval to the decision of Zacaroli J in *Re Barclays Bank PLC and Barclays Bank Ireland PLC* [2018] EWHC 2868 (Ch) as reflecting what the Chancellor had called a willingness to give prospective guidance. In that case, Zacaroli J was asked to rule on the question of whether or not part of the business sought to be transferred fell within the scope of the business capable of being transferred pursuant to s.112(1)(d) of FSMA. To that end, he expressed provisional views that it was incidental, consequential, or supplementary to the scheme and that an order was necessary to secure that the scheme was fully and effectively carried out.

15 Before embarking on that question, Zacaroli J satisfied himself that it was appropriate for the court to give prospective guidance. He did so because, if he were to have concluded that there was no jurisdiction to affect the proposed transfer, then the applicants would have needed to begin work immediately to seek to reach agreement with a large number of persons in order to replicate, so far as possible on a bilateral basis, the effect of the proposed scheme. This would have been very time-consuming and even if commenced at the time of his judgment, it would have been unlikely that it would have been completed by the date then envisaged for the UK's withdrawal from the EU.

16 In considering the appropriate way forward, I have had regard to the position of the PRA and the FCA both of whom have said that they do not object to the point of construction being determined in the manner for which the applicants contend. Indeed, they go so far as to submit that anyway at some stage, they consider it is necessary for the point to be considered by the court given its relevance to this and other transfers. Of course, the means by which the point is considered is a matter for the court not the regulators but, in my view, the attitude that they have adopted is one which the applicants can pray in aid in support of an application to grant some form of relief at this stage.

17 In all these circumstances, I have reached the view that in the present case, which is one of a time sensitive Brexit related scheme, it is appropriate for the court to express its provisional conclusions on the point of construction raised by the application albeit by way of prospective guidance only. If the court has no jurisdiction to sanction the scheme unless it is effective before 31 December 2022, and any necessary ancillary orders under s.112 must be made before that date, it is still open to the applicants to design their timetable to achieve that end. However, that will give rise to practical difficulties and there are real and relevant benefits in having a timetable which enables the scheme, while sanctioned by order made before 31 December 2022, to be effective after that date. I will touch on those benefits shortly but, in my view, the expeditious conduct of these proceedings makes it appropriate for guidance to be given.

18 Against that relatively lengthy introduction, I turn to the substance of the point on which guidance is sought. One of the effects of Brexit is that UK insurers such as the applicants, both of whom had written and administered insurance business in other EEA states in accordance with the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, or predecessor legislation, were no longer permitted to provide services in the EU. The consequence is that the applicants have lost their rights to service contracts on a freedom of services basis in the countries in which they have previously carried out those activities. In these circumstances, the purpose of the Scheme is to transfer all of the applicants' legacy EEA business to a newly incorporated insurer domiciled in Ireland, Phoenix Life Assurance Europe Designated Activity Company ("PLAE") which will be able to continue to service such contracts pursuant to its own EEA passporting rights. Like the applicants, PLAE is an indirect subsidiary of Phoenix Group Holdings Limited. It is anticipated that PLAE will receive authorisation from the Central Bank of Ireland before the time of the sanction hearing. The policies proposed to be transferred are certain with profits, unit-linked saving, investment and protection products, and critical illness policies. They were all held at inception by policyholder's resident in EEA countries outside the United Kingdom.

19 The benefits of the proposal are not a matter for me today, but the evidence is that the transfer will safeguard future customer stability and the policyholders' ability to access the range of benefits available to them under their policies in light of the UK's departure from the EU. In particular, it is said that by giving effect to the transfer, the affected

policyholders will have the benefit of consistency and continuity in the event of any future legislative or regulatory divergence between the UK and the EU.

20 It is relevant to the point of construction with which I am concerned to look at both (a) the inability of a UK insurer to continue post-Brexit to service business in the EEA on a freedom of service basis, and, (b) the solution of incorporating an EEA domiciled subsidiary with the ability to take a transfer of the affected policies, in its regulatory context. The European Commission has expressly confirmed in its "Notice to Stakeholders Withdrawal of the United Kingdom and EU Rules in the Field of Insurance/Reinsurance" document dated 13 July 2020, replacing an earlier version dated 8 February 2018, that an EEA insurer such as PLAE, which is a subsidiary of a UK insurer, would be permitted to conduct cross-border business into other EEA states pursuant to the appropriate passporting rights. I quote a short passage to quote from that document:

> "EU-27 subsidiaries (legally independent companies established in EU-27 and controlled by or affiliated to insurance undertakings established in the United Kingdom) can continue to operate as EU insurance undertakings on the basis of their authorisation in the EU Member State of their establishment and subject to their compliance with the EU rules, including in terms of solvency, governance (notably risk management and outsourcing) and disclosure to requirements."

21 In that context, by a formal set of recommendations to EEA insurance regulators issued in February 2019, the European Insurance and Occupational Pensions Authority ("EIOPA") endorsed the option of transferring legacy EEA business to EEA-regulated insurance undertakings by means of insurance business transfers provided that the process was initiated before the withdrawal date. I quote a short passage from that document:

> "Recommendation (5) - Portfolio transfers: Competent authorities should allow the finalisation of portfolio transfers from UK insurance undertakings to EU-27 insurance undertakings, provided that it was initiated before the withdrawal date … Competent authorities should deem a portfolio transfer to be initiated in case the UK's supervisory authorities have notified them about the initiation of the portfolio transfer and the UK insurance undertaking has paid the regulatory transaction fee to the supervisory authority(s) in the UK and appointed an independent expert for transfer."

22 Against that background, the English law consequence of Brexit on the ability of the UK insurer to apply for the sanction of a transfer scheme including EA business can be summarised as follows. The starting point is that, with effect from the end of the Brexit implementation period, i.e. 31 December 2020, an insurance business transfer scheme as defined by s.105 of FSMA will no longer qualify as such if it includes business carried on in an EEA state. I should add that the effective date was originally 31 January 2019 when the concept was exit day but was then changed to 31 December 2020 when the concept of IP completion day was introduced.

23 This change has been affected by amendments to s.105 but there are transitional provisions which permit the sanction of an insurance business transfer scheme if it qualifies as a transitional insurance business transfer scheme within the meaning of the schedule to the 2019 Regulations (see the form of s.105 which survives in relation to transitional insurance

business transfers schemes by operation of the Schedule). For this purpose, two conditions must have been satisfied both of which derived from or at least mirror recommendation (5) of the EIOPA February 2019 recommendations to insurance regulators. The first is that before IP completion day, the fee required to be paid by a person applying for an insurance business transfer scheme under Part VII of FSMA has been paid. The second is that the independent person required by s.109(2)(b) of FSMA has been approved by the appropriate regulator in accordance with that section before IP completion day. The evidence is that both of these conditions have been satisfied in the present case.

24 However, the permissions granted by the transitional provisions are time limited. Paragraph 2 of the schedule to the 2019 Regulations (as amended) provides that an order may only be made under s.111 (sanction of the court for business transfer schemes) of the Act sanctioning a transitional insurance business transfer scheme within the period of two years beginning with IP completion day.

25 The evidence is that until recently, it was anticipated that the timetable for the Scheme, if it were to be sanctioned, would involve the making of the order and the Scheme becoming effective well before 31 December 2022. For these purposes, what is meant by a scheme becoming effective is the occurrence of the effective date on which the transferring business, in fact, transfers to PLAE as transferee. However, it is now proposed that although the court will be asked to sanction the Scheme sometime before 31 December 2022, it will only become effective immediately after midnight on 31 December 2022 rather than any time before. The applicants will also propose a fallback effective date at the end of the next quarter following 31 December 2022 to deal with the possibility of unexpected developments. There is also a possibility, although not presently anticipated, that ancillary orders under s.112 of FSMA may be sought after that date.

26 Quite apart from the desirability of ensuring that the complex arrangements involved in the present case are given sufficient time to become effective, one of the reasons for this change in timetable is that having an effective date of 1 January 2023 will align with the introduction and application of a significant new accounting standard, IFRS 17, which means that all reporting systems and structures for PLAE which are required to be in place can be implemented from the outset utilising the approach of the new regime under that IFRS. As explained in the evidence in support of this application, the consequence of not providing for the transfers to be effective before 1 January 2023 is that management will not be required to implement for PLAE in parallel to IFRS 17 additional reporting systems aligning with the current regime.

27 Mr Moore submitted that these reasons, which are explained in greater detail in the evidence, are plainly good and substantial reasons and the independent expert has confirmed that a proposed effective date of 1 January 2023 will not affect his conclusions regarding the impact of the Scheme on any relevant group of policyholders. I can see the force of Mr Moore's submission but I do not think that it would be right for me to hold now that these reasons are, in fact, plainly good and substantial. That is a matter for the sanction hearing. I will say however that they are sufficiently compelling for me to be satisfied that it is appropriate for the court to address by way of prospective guidance the jurisdiction issue raised by this application.

28 The legal effect of this proposal is that there is now what Mr Moore calls a hitherto unresolved question: whether an order can be made prior to 31 December 2022 sanctioning a scheme which will otherwise qualify as a transitional insurance business transfer scheme but which will only become effective after 31 December 2022 albeit immediately thereafter.

It also raises the question of whether ancillary orders made under s.112 of FSMA can be made after that date. If the applicants have to ensure that the Scheme becomes effective by 31 December 2022 with no possibility of a fallback date, the longer they have to do so the better.

29 The applicants submit that the answer to this question is clear. They say that the court does have jurisdiction to make an order prior to 31 December sanctioning this transitional insurance business transfer scheme notwithstanding that it is to take effect thereafter. It does so for a number of reasons with which, for the most part, I agree. The first, and what Mr Moore calls the most obvious reason, is that the plain wording of para.2 of the Schedule to the 2019 Regulations (as amended), says, in terms, that the only question is when the order is "made". It is subject to no qualifications and the ordinary meaning of the word "made" is when an enforceable order is pronounced by the court. This will normally be at or about the time that it is sealed. In my view, this is the correct starting point.

30 The second reason is that there is no indication from the wording of para.2 or indeed anywhere else in the Schedule that, when the legislature referred to an order being made under s.111 within two years beginning with IP completion day, the word "made" had a more expanded meaning than is normally used such that the legislature intended that the scheme the subject of the order must also come into effect within that period. Indeed, in my view, quite the contrary. I agree with Mr Moore's submission that the making of an order by the court sanctioning a scheme is a quite separate concept from the scheme itself coming into effect. That they are two separate and distinct events is clear from the terms of the statute itself. Section 111(2)(b) of FSMA requires the court to be satisfied before it makes an order sanctioning an insurance business transfer scheme that the transferee has the necessary authorisation to carry on the business and "or will have it before the scheme takes effect". This contemplates two separate events that may or may not take place at separate moments in time.

31 In my view, this is also supported by the way in which the jurisdiction, including s.112 of FSMA, operates as a matter of practical reality. This section explicitly provides that the court may make a number of different types of ancillary order after the initial order sanctioning the scheme has been made. Many of these orders are an essential part of the process of ensuring that a scheme can be effective in practice. As Mr Moore submitted, in the area of court-approved transactions such as schemes of arrangement under Part 26 of the Companies Act 2006, the timeline between a court order sanctioning or confirming the matter in hand and it becoming effective is well embedded in practice. Against this background, there is force in the submission that if the legislature enacting the 2019 Regulations had intended to roll the effectiveness of the scheme into the single concept of when the sanction order was made, it would have said so in very much clearer terms.

32 The third reason is that no parliamentary or other materials, admissible or not, appear to exist to make any contrary suggestion and the wording of the explanatory memorandum is entirely consistent with the natural meaning of the words used. Likewise, as Mr Simpson explained in his skeleton argument, there is nothing to be derived from the European materials which supports an argument that the word "made" ought to be given a more expansive meaning. In particular, unlike the payment of the fee in the appointment of the independent expert, which must be paid or in place before IP completion day as preconditions to the scheme being capable of qualifying as a traditional insurance business transfer scheme, the two-year limit referred to in para.2 of the Schedule to the 2019 Regulations has no EU law or regulatory genesis.

33 The fourth reason is that there is no discernible policy reason why a scheme should have to be both sanctioned and effective prior to 31 December 2022. I agree with Mr Moore's submission that the critical step is that the scheme should have been considered by a court with the benefit of a scheme report, the regulator's view, and with policyholders having had the opportunity to object prior to 31 December 2022. This establishes an appropriate level of consistency and certainty in relation to the operation of the transitional provisions. To focus on the time at which a scheme becomes effective rather than the time at which the sanction order is made is counterintuitive not least because there will often be some uncertainty about precisely when a scheme may be effective, more particularly, if transfers are effected in tranches or the effectiveness is delayed under its terms by reason of some form of supervening impediment.

34 This policy-based submission also has the advantage of being consistent with the PRA's "Dear CEO" letter to UK insurers servicing legacy EEA business dated 25 October 2020 which focused on the making of the sanction order as being the operative time without any reference to the time at which the transfer might come into effect.:

> "Parliament has legislated for a Part VII 'saving provision'. This will provide up to two years from the end of the transition period for parties to obtain a UK court order sanctioning the transfer of insurance business."

35 Finally, Mr Moore submitted that it could not possibly make a jot of difference to a policyholder whether the scheme becomes effective at 11.59 p.m. on 31 December 2022 or one minutes past midnight on 1 January 2023, a view that appears to be confirmed by the independent expert. While I accept that he may be correct on this point and that it goes to the question of whether there is any reason, from a timing perspective, as to why the court should not sanction the scheme, I do not find it of any particular assistance on the point of construction. Nonetheless, on the basis of the arguments so far advanced, the other factors on which he relies have persuaded me that the court does have jurisdiction to sanction a transitional insurance business transfer scheme where the sanction order has been made in the sense of it being pronounced prior to midnight on 31 December 2022 whether or not it is also effective prior to that time.

36 I also consider that para.2 of the Schedule to the 2019 Regulations does not mean that orders under s.112 cannot be applied for and made after 31 December 2022 in relation to a transitional insurance business transfer scheme which has been sanctioned by order made under s.111 prior to that date. In my view, this follows both from the conclusion I have already expressed and from the opening words of s.112 itself:

> "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..."

37 In my judgment, this language clearly differentiates between the order made under s.111 and the order made are under s.112 both of which may be made but do not have to be made at the same time. If the court seeks to exercise the jurisdiction to make an order under s.112 after the time at which it makes the order under s.111, it is not then an order made under s.111. It is an order made under s.112 which can only be made in circumstances in which the court has made an order under s.111(1). But, in my judgment, that is not the same thing and, more importantly, it is not an order which, if made at all, must be made before midnight on 31 December 2022.

38 So, in all these circumstances, I am satisfied on the basis of the arguments so far advanced and subject to the limitations flowing from the stage which the proceedings have now reached that the construction for which the applicants contend (and to which the regulators do not object) is correct. I am prepared to give prospective guidance reflecting the conclusions I have expressed in this judgment in order to facilitate the proper progress and case management of the proceedings.

39 This conclusion will not prevent policyholders from arguing that I was wrong in reaching the conclusions I have reached should they wish to do so at the sanction hearing. It seems to me that the appropriate form of relief is now in the form asked for by the applicants and I will so order.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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