Neutral Citation Number: [2019] EWHC 3336 (Ch)

Case No: CR-2019-004715 & CR-2019-004716

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

Royal Courts of Justice
Rolls Building

Date: 04/12/2019

Before :

MR JUSTICE ZACAROLI

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IN THE MATTER OF THE EQUITABLE LIFE ASSURANCE SOCIETY
-and-
IN THE MATTER OF THE COMPANIES ACT 2006

IN THE MATTER OF THE EQUITABLE LIFE ASSURANCE SOCIETY
-and-
IN THE MATTER OF UTMOST LIFE AND PENSIONS LIMITED
-and-
IN THE MATTER OF PART VII OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

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Martin Moore QC and Stephen Horan (instructed by **Freshfields Bruckhaus Deringer LLP**) for **The Equitable Life Assurance Society** and **Utmost Life and Pensions Limited** (instructed by **Linklaters LLP**)
Tom Weitzman QC for the **Prudential Regulation Authority**
Theodor Van Sante for the **Financial Conduct Authority**
Mark Beddow, Dean Buckner, Christopher Gibbons, Michael Johnson and Gareth Jones, current or former policyholders of The Equitable Life Assurance Society **appeared in person**

Hearing dates: 22 and 25 November 2019

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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.

....
MR JUSTICE ZACAROLI

Mr Justice Zacaroli :

1. The Equitable Life Assurance Society ("Equitable") seeks the court's sanction, pursuant to Part 26 of the Companies Act 2006 ("CA 2006") of a scheme of arrangement. In addition, Equitable and Utmost Life and Pensions Limited ("Utmost") seek the court's sanction, pursuant to Part VII of the Financial Services and Markets Act 2000 ("FSMA") of a scheme providing for the transfer of most of Equitable's business to Utmost.

2. I will refer to the scheme of arrangement under CA 2006 as the "Scheme" and I will refer to the transfer scheme under FSMA as the "Transfer". The Scheme and the Transfer are inter-conditional, with the Scheme intended to take effect immediately prior to the Transfer.

3. The background and essential features of the Scheme and the Transfer were succinctly described by Norris J in paragraphs 1 to 13 of his judgment dated 23 July 2019 following the hearing to obtain directions in relation to the Scheme and the Transfer (the "Convening Hearing") [2019] EWHC 2345 (Ch). For convenience I set out those paragraphs in full:

> "1. Equitable Life Assurance Society ("Equitable") was the first mutual assurance society, being founded in 1762. Its excess assets, unused in its business, belong to its members. The members are, under its constitution, the policyholders who have effected life assurance and pension contracts which permit participation in profits ("with profits policyholders").
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> 2. Equitable does conduct some "non-profit business" by way of re-insurance. Equitable also does offer life assurance and pension contracts that are "unit linked", where the sum payable is directly linked to the quoted price of units in specific in-house funds with identified investment objectives. By contrast, with-profits policyholders are entitled to a sum which is indirectly linked to the return made by Equitable upon its general funds. Such part of the current investment returns as the directors think prudent are added to the policy value on an annual basis; and when the policy matures, such part of Equitable's own funds (which include accumulated capital profits) as the directors think prudent, are then added to the sum otherwise payable.
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> 3. "Unit-linked" policies are incompatible with guaranteed returns; the holders of "unit-linked" policies are fully exposed to the benefits of all the rewards of growth and to the risks of all falls in value. The vast majority of "with-profits policyholders", however, have *guaranteed* returns: whatever the actual investment performance, the return on their policy will be at a specified or calculable level based on the premiums that they have paid. These maybe called "guaranteed investment returns" or "GIRs". Sometimes the GIRs are explicitly referred to in the policy as such; but sometimes they

are implicit in the policy terms, having regard to the sum that is payable under the policy.

4. The guaranteed investment returns range from 0 per cent where (whatever the performance of Equitable’s investments) the policy value cannot fall below the premiums paid, to a positive return such that (whatever the performance of Equitable’s investments) at the point the claim is paid the premiums paid must show a growth of 2.5 per cent or 3.5 per cent per annum. Because this investment risk is borne by Equitable, Equitable must carry capital to cover even the remotest risk of the guarantee being called on.

5. This GIR represents a floor. If Equitable's performance exceeds the guaranteed minimum, then the “with-profits” policyholder is entitled to his or her actual share of the With-Profits Fund that is distributed rateably between policyholders irrespective of whether or not they have a guaranteed return, and irrespective of the level of the guarantee. I should emphasise in this summary that the interest of a policyholder in the assets of Equitable is through his policy and not through some independent membership right.

6. As is well known, since 2000 Equitable has been closed to new business and is in solvent run-off. At present there are, firstly, some 180,000 policies issued directly to individuals or to an individual. They are held by some 164,000 policyholders. Secondly, there are some 2,600 policies issued to trustees of group pension schemes for the benefit of some 143,000 pension scheme members. Thirdly, there are some 2,100 individual pension plans issued to employers for the benefit of an employee but where there has been no assignment to an individual employee. There is some £6 billion under management in relation to these policies.

7. There are also, I should mention, some niche products. These arise out of marketing campaigns conducted between 1993 and 2000. First, there are some German policies. These consist partly of UK-style German “with-profits” policies which participate in profits and losses of Equitable in the same way as the English “with-profits” policies. There are 319 of these policies. They have a value of about £6 million. Alongside these there are some German-style German “with-profits” policies which participate in profits in accordance with an agreed business plan with the German financial regulator and are effectively funded by a covered by a fund. They total some £6 million. I will refer to these as "the German policies".

8. Secondly, there were some long-term insurance contracts, now denominated in Euros, governed by Irish law, which were written from a distribution office in Dublin. There are some 2,400 of these Irish policies. These had a "best estimate" liability of about £44 million as at 31 March 2019.

9. I mention the German policies because they fall outside the arrangements with which I am concerned. I mention the Irish policies because they form part of the first element of the arrangements with which I am concerned (namely the scheme) but will not form part of the second element (namely the transfer).

10. A fundamental issue of principle is raised by Equitable's business model being conducted in solvent run-off. It is perfectly encapsulated in the report of the Independent Expert for the policyholders, Mr Jones. He explains:

> "In order to ensure continuing solvency, Equitable must hold back assets in order to meets its statutory capital requirements. Since the Society is in run-off, the requirement to hold these assets back means that it will become difficult to distribute assets fairly and quickly amongst the with-profits policyholders over time. In addition, as the number of policies reduce, it becomes difficult to reduce expenses in line with how policies run off, and expenses per policy could rise."

11. He expands on this at paragraph 1.4.2 of his report. He points out that the Equitable's overall strategy for its run-off is (i) to distribute all the assets amongst "with-profits" policyholders as fairly and as soon as possible; (ii) carefully to manage solvency to enable capital distribution and only then to seek to maximize returns; (iii) to provide a best "value for money" cost base. This strategy must be implemented in the context of the necessity to hold back of assets in order to meet statutory requirements. Most pension policies have the flexibility to claim payment (and invoke their GIRs) at any time after a certain date; this means that the Society is required to hold capital against the risk that policyholders defer taking their investments when long-term interest rates are low, thereby increasing the risk that the investment guarantees reduce solvency levels. Long-term interest rates remain low, and so Equitable is required to hold back capital to support the higher solvency requirements. The requirement to hold back these assets means that it will become difficult to distribute assets fairly and quickly amongst the "with-profit" policyholders over time.

12. Each year, the Equitable board decides whether an adjustment in capital distribution is warranted. At present a

> capital enhancement factor ("CEF") of 35 per cent is added to the policy value. This is set at a level such that there is an acceptably low risk of having to cut a future CEF in order to protect the interests of policyholders taking benefit for the longer term. But, as Mr Jones points out, judgement is required to avoid the development of any "tontine"; that is to say, the circumstance in which an unduly large proportion of the assets remains to be distributed at a time when disproportionately few policyholders remain to share in that distribution.
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> 13. To address the potential "tontine" effect engendered by the requirement to hold very high levels of capital occasioned by the GIRs Equitable has for some time been preparing a restructuring package, first announced during 2018. This restructuring package has three elements. First, a scheme of arrangements with "with-profits" policyholders (other than the German policyholders) converting their "with-profits" policies to "unit-linked" policies and effecting a value uplift to distribute now the prospective entitlement to share in any future capital enhancement. Secondly, in consequence, the removal of the GIRs and their replacement by a distribution now (by means of a further value uplift) of the prospective benefit of that guarantee. Thirdly, a transfer to Utmost Life and Pensions Limited ("Utmost") of the "unit-linked" business, except for the German policies and the Irish policies, in relation to which Brexit issues arise. These excluded policies will be retained by Equitable but will be reinsured to Utmost. The transfer means that Utmost's capital is being used to support the "unit-linked" business which is being transferred; and that means that more of Equitable's own funds can be distributed to the "with-profits" policyholders under the scheme of arrangement. The transfer to Utmost also has the benefit of reducing anticipated administration costs, and the value of these savings too can now be made available for distribution."

<u>The Scheme</u>

4. The Scheme effects a compromise with all with-profits policyholders, save only for approximately 469 with-profits policyholders whose policies are governed by German law ("German With-profits Policyholders"). These are excluded from the Scheme due to a significant concern that the Scheme might not be recognised in Germany and (in relation to 150 of the policyholders, referred to as German-style with-profits policyholders) because they are not with-profits policies in the English sense at all, but have only restricted rights to participate in a share of profits and losses of the with-profits fund. In addition, about 1000 whole of life policies are included in the Scheme, where the policy includes a guarantee to pay the sum assured together with any guaranteed bonus allotted to the policy.

5. The with-profits fund value has two elements. First, an investment return which Equitable applies over time to premiums paid into the with-profits fund, which gives the policy values. These can go down as well as up. Second, a capital return when

policyholders take their benefits. The Equitable adds to the policy value a share of the assets in the with-profits fund. This is currently 35% of the policy value at 31 December 2014, but can change from time to time, and could also be removed.

6. As noted by Norris J, the main compromise effected by the Scheme is that policyholders' entitlement to participate in Equitable's profits will be removed and the policies will become unit linked. The Scheme also removes any entitlement to investment guarantees.

7. The Scheme policyholders will be able to select from a number of unit-linked funds with varying degrees of risk. In the absence of a selection being made by a policyholder, then its policy values will be placed in a pre-determined unit-linked investment strategy known as the Automatic Investment Option.

8. In return for giving up their rights to share in the profits of Equitable, the Scheme policies will get an uplift in policy value. The increase is applied to their policy value as at 31 December 2017 in the case of recurrent single-premium policies (which make up most of the with-profits policies). That date is chosen to preclude Scheme Policyholders from benefitting by making payments into the with-profits fund in order to take advantage of the Scheme. In the case of conventional with-profits policies the uplift will be applied as at the Implementation Date.

9. There are two aspects to the uplift. The primary uplift allocates to each Scheme Policyholder their proportionate share of the assets available for distribution in the with-profits fund. The policy value of each scheme policy will be increased by the same percentage (which, according to the Equitable's Chief Actuary in his supplemental report, is estimated to be 72% calculated at 30 June 2019 based on estimated policy values at 31 December 2019).

10. The secondary uplift reflects in part the value of the investment guarantees, based on potential future scenarios where the amount payable under the investment guarantee is expected to exceed the policy value after the addition of the primary uplift. It attaches a value to six "fairness indicators", the purpose of which is to ensure that the policyholders with GIRs (of differing rates) as a group are not worse off as a result of the implementation of the Scheme.

11. For example, the first fairness indicator is that the policy value will be higher for all Scheme Policyholders than if a policyholder had taken their benefits (assuming the Scheme was not implemented) on the Implementation Date (being 1 January 2020, provided certain conditions have been met by then, or the first day of the next quarter after a date thereafter when the conditions are met). The total amount of the Secondary Uplift is expected to be less than 8% of the total amount of the fund that is allocated.

12. The Scheme provides, in the event that the fairness indicators are not met by the uplift, that money will be added to the secondary uplift. It is currently estimated that this "fairness adjustment" will be less than £1 million.

The Transfer

13. The Transfer relates to all policyholders except: (1) policyholders whose policies are governed by German law ("German Policyholders"); (2) policyholders whose contracts are governed by Irish law ("Irish Policyholders"); and (3) those with policies which are unable to be transferred on the Implementation Date ("Excluded Policies"), although there are not anticipated to be any of these, save for policies written under Guernsey law in Guernsey and Jersey which will be Excluded Policies until local transfer schemes in Guernsey and Jersey have become effective. Hearings are listed for the sanction of those schemes on (respectively) 6 and 10 December 2019. If there are any Excluded Policies, then they will be reinsured by Utmost, and may be transferred to Utmost on a later date.

14. Aside from German and Irish Policyholders and Excluded Policies, the whole of Equitable's business will be transferred, including protection, pensions, annuity and investment products. All policies, and associated assets and liabilities, will be transferred to Utmost and allocated to the Utmost Non-Profit Fund.

15. The Transfer does not effect any change to the transferring policyholders' terms and conditions.

16. The Transfer does, however, contain specific provisions to deal with the German With-profits Policyholders (whose policies are not being transferred). In order to achieve Equitable's aim of allocating all of its available assets to its with-profits policyholders as fairly and as soon as possible, the financial benefits sought to be conferred by the Scheme will be extended to the UK-Style German With-profits Policyholders.

17. This is to be achieved by creating a new ring-fenced sub-fund within Equitable, the German With-Profits Fund. The UK-Style German With-profits Policyholders will receive an increased asset share, in an amount equal to the primary uplift as if they had been included in the Scheme. That increase will be allocated to the German With-Profits Fund. The German With-Profits Policyholders who are members will cease to be members as a result of the change to the Articles. There is no change to the policy terms and conditions of German With-profits Policyholders, who will retain their with-profits policies and keep their investment guarantees.

The relationship between the Scheme and the Transfer

18. I have referred to the fact that the Scheme and Transfer are both – as a matter of form – conditional on the other becoming effective. There is, however, a more substantive connection between them.

19. The twin commercial objectives of the accelerated capital distribution pursuant to the Scheme are (i) to address the unfairness which will arise from the tontine effect in the run-off of Equitable's with-profits business and (ii) to avoid the increasing cost inefficiencies as the fund becomes smaller over time.

20. The immediate consequence for Equitable, however, of distributing capital so as to increase policy values of all policyholders will be that it will then hold (because of those increased policy values) insufficient capital to meet its own capital

requirements. Given that Equitable is a mutual fund, without the support of a parent or other group companies, and given that it is in run-off, it is not in a position to raise the necessary capital to meet its requirements. It is a term (indeed, condition) of the Scheme, and as a result of the Transfer, that Utmost will receive a capital injection sufficient to enable it to satisfy a solvency capital requirement ratio of 150% (see further below, for an explanation of this). That is currently anticipated to be in the region of £150 million. The Transfer, therefore, is a commercial necessity if the Scheme is to achieve its objectives.

21. In addition, Utmost is of such a size that it will avoid the cost inefficiencies inherent in the continued run-off by Equitable.

Reports of Independent Experts, the FCA and the PRA

22. It is a statutory requirement of the Transfer (s.109 of FSMA) that it is accompanied by a report from an independent expert.

23. I have received the following reports prepared by Mr Richard Baddon of Deloitte MCS Limited and a Fellow of the Institute and Faculty of Actuaries (the "Transfer Independent Expert"): (1) an initial report dated 16 July 2019; (2) a short update by way of letter dated 18 October 2018; and (3) a supplemental report dated 8 November 2019.

24. I will address relevant parts of the reports of the Transfer Independent Expert when considering specific points of objection made to the Transfer. For present purposes, I simply note his conclusion (across his three reports) that:

i) The Transfer will not have a material adverse effect on the benefit security of transferring policyholders;

ii) The benefit expectations of transferring policyholders will not be materially adversely affected by the Transfer;

iii) The benefit expectations of non-transferring policyholders will not be materially adversely affected by the Transfer;

iv) The Transfer will not have any material adverse effect on the benefit expectations of existing Utmost policyholders; and

v) the Transfer will not have any effect on the quality of service standards or administration experienced by policyholders.

25. In addition, although there is no statutory requirement in this respect, I have been provided with reports from a further independent expert, commissioned to consider the Scheme. These reports, prepared by Mr Trevor Jones, a partner of KPMG and a Fellow of the Institute and Faculty of Actuaries (the "Policyholder Independent Expert"), are: (1) an initial report dated 15 July 2019; (2) an interim supplemental report dated 11 October 2019; and (3) a supplementary report dated 15 November 2019. He has considered at length, among other things, the Scheme's likely effect on all policyholders' expectations, the fairness of any changes which may be made to the treatment of different groups of with-profits policyholders as a result of the Scheme

and whether the Scheme would have any adverse effects on the security of benefits for any policyholder who is not a Scheme policyholder. His overall conclusion is that the Scheme is fair. The fairness of the Scheme is one of the principal issues for the court on the application for the sanction of the Scheme, and is one which the court must determine for itself. It is nevertheless helpful – particularly given the inter-relationship between the Scheme and the Transfer – to have the benefit of the very detailed explanation of the Scheme conducted by the Policyholder Independent Expert, and his explanation for why particular aspects of the Scheme operate fairly in the interests of the policyholders. I will refer to specific parts of his reports, as necessary, when considering the objections raised to the Scheme.

26. The Prudential Regulation Authority ("PRA") and the Financial Conduct Authority ("FCA") have been closely involved with the process and have reviewed the documentation. The FCA has provided two reports on the Scheme and two reports on the Transfer. The PRA has provided two reports on the Transfer. They have both stated that they have no objection to the Scheme or the Transfer. I will again deal with specific aspects of these reports, as necessary, when considering the objections raised to the Scheme and Transfer.

Legal requirements: the Scheme

27. The task of the court on an application to sanction a scheme of arrangement under Part 26 of CA 2006 was summarised by Morgan J in *Re TDG plc* [2009] 1 BCLC 445, at [29]. The court must be satisfied that:

i) The provisions of the statute have been complied with;

ii) The class of creditors, the subject of the court meeting, was fairly represented by those who attended the meeting, and the statutory majority are acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent;

iii) An intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme;

iv) There must be no blot on the scheme.

28. Morgan J also noted:

> "It is also right to record that the court does not act as a rubber stamp simply to pass without question the view of the majority but, equally, if the four matters I have referred to are all demonstrated, the Court should show reluctance to differ from the views of the majority, and should certainly be slow to differ from the majority, on matters such as what an intelligent, honest person might reasonably think."

29. I am satisfied on the basis of the evidence presented to the court that the provisions of the statute, and the directions of the Court made at the Convening Hearing, have been complied with.

30. Norris J directed that there be a single class meeting of all Scheme Policyholders. In doing so he took into account objections made by a number of policyholders. At [17] to [50] of his judgment he addressed the legal principles, their application to the facts in this case, and the potential objections to directing a single class meeting. In particular, he gave consideration to the fact that only some of the Scheme policyholders had the benefit of GIR, that different Scheme policyholders had different rates of GIR, and that only those with GIR have a right to participate by way of secondary uplift under the Scheme. His conclusion was that such differences as existed in the rights of Scheme policyholders (both prior to, and under, the Scheme) were not so significant that they precluded all Scheme policyholders from conferring together on the essential question posed by the Scheme, namely whether it is desirable to effect a present distribution of assets rather than to remain in a solvent run-off.

31. Where, as here, a court has reached a conclusion and provided a reasoned judgment as to class composition at a convening hearing held in circumstances where scheme creditors had been given sufficient notice of the issues that were to be determined at that first stage then, while the decision made at the convening hearing is not binding upon the court considering whether to sanction the scheme, in practice the court at that later stage will not re-open the issue of class composition in the absence of some new argument or objection being raised: see for example, *Re Stripes US Holdings Inc* [2018] EWHC 3098 (Ch), per Marcus Smith J at [29] to [31]. In this case, no new arguments or objections are raised relevant to class composition beyond those that were considered by Norris J. Accordingly, I do not in this judgment address the question of class composition again.

32. It is a statutory requirement (by s.899 CA 2006) that the Scheme is approved by a majority in number, representing 75% by value, of the Scheme creditors "present and voting either in person or by proxy at the meeting". 94.39% by number of Scheme Policyholders who voted, representing 95.71% by value, approved the Scheme. Accordingly, the statutory majorities were very comfortably exceeded.

33. I stress that the required majority is of those who vote, not of the policyholders as a whole. This is a partial answer to the complaint made by some policyholders that the Scheme is being forced on the majority of policyholders by a minority. A further answer to that complaint is provided by the need for the court to be satisfied of the other matters identified by Morgan J, in particular the second matter, namely that creditors attending the meeting fairly represented the class as a whole and were not coercing the minority.

34. As to that, it is first important to note that the proportion of creditors attending and voting at the meeting (as a fraction of all Scheme policyholders) was relatively low: 26.32% by number and 50.42% by value.

35. I am nevertheless satisfied that this was fairly representative of the class as a whole, and that there was no coercion of the minority, for the following reasons:

    i) Considerable effort was made to engage with policyholders, to encourage them to participate, and to analyse voting data to identify groups that might have difficulty engaging;

ii) In previous surveys conducted by Equitable, the response rate from policyholders was no higher than approximately 15% and only approximately 7% of policyholders typically vote at Equitable's annual general meetings;

iii) For many policyholders, their policy values are relatively small and do not represent their main source of income;

iv) Voting turnout was broadly consistent across the different cohorts of policyholder (e.g. divided by gender, age-group, location and type of policy);

v) As compared to the turnout of voters experienced in other comparable retail schemes, the turnout in this case was relatively high;

vi) In *Re Cape Plc* [2006] EWHC 1446 (Ch), David Richards J (at [21] to [26]) held that a low turnout is not in itself a reason to refuse to sanction a scheme. In *Re TDG plc* (above), Morgan J (at [25]) noted that, given the numerous reasons a shareholder may choose not to vote, that a non-voting shareholder "is not to be equated in any sense with an opponent of the scheme".

36. So far as the third question is concerned, leaving aside the specific points of objection, to which I will return below, I consider that the essential question posed by the Scheme (namely, as noted above, whether it is desirable to effect a present distribution of assets rather than to remain in a solvent run-off) is one which an honest and intelligent policyholder, acting in respect of his or her own interest, might reasonably answer in the affirmative.

37. Moreover, as noted by David Richards J in *Re Telewest Communications plc (No.2)* [2005] 1 BCLC 772, at [22], "in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting'." Accordingly, the fact that an overwhelmingly large proportion of those policyholders who voted, voted in favour of the Scheme, provides additional comfort on this point.

38. In relation to the fourth matter, there is nothing which would amount to a "blot" (such as a technical or legal defect in the Scheme) in this case.

39. This is a relatively rare case where a scheme of arrangement with creditors is proposed in respect of a solvent company. That, however, is not something which precludes sanctioning the Scheme, whether on the grounds that it is unfair or otherwise. The scheme jurisdiction in relation to creditors is not limited to cases where there is "a problem requiring a solution" such as prospective insolvency: Re Scottish Lion Insurance Co Ltd [2010] CSIH 6, [2010] BCC 650 a decision of the Inner House, Court of Session, at [42]-[45]. In any event, 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.

Legal requirements: the Transfer

40. Section 111(2)&(3) of FSMA provide that before approving an insurance business transfer scheme the court must be satisfied that:

    i) The appropriate certificates have been obtained;

    ii) The transferee has the authorisation required (if any) to enable the business, or part, which is to be transferred to be carried on in the place to which it is to be transferred; and

    iii) In all the circumstances of the case, it is appropriate to sanction the scheme.

41. The third (and substantive) requirement has been explained in a series of previous decisions.

42. In *London Life Association Limited* (unreported, 21st February 1989) Hoffmann J (as he then was) said:

> "In the end the question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected. But the court does not have to be satisfied that no better scheme could have been devised … I am therefore not concerned with whether, by further negotiation, the scheme might be improved, but with whether, taken as a whole, the scheme before the court is unfair to any person or class of persons affected.
>
> In providing the court with material upon which to decide this question, the Act assigns important roles to the independent actuary and the Secretary of State. A report from the former is expressly required and the latter is given a right to be heard on the petition. The question of whether the policyholders would be adversely affected by the scheme is largely actuarial and involves a comparison of their security and reasonable expectations without the scheme with what it would be if the scheme were implemented. I do not say that these are the considerations, but they are obviously very important. The Secretary of State, by virtue of his regulatory powers, can also be expected to have the necessary material to express an informed opinion on whether policyholders are likely to be adversely affected."

43. In *Axa Equity & Law Life Assurance Society plc* [2000] 1 All ER (Comm) 1010, Evans-Lombe J referred to Hoffmann J's judgment and summarised the following principles which he derived from that decision:

> "It seems to me that the following principles emerge from the judgment of Hoffmann J which should govern the approach of the Court to applications of this type. I gratefully adopt those principles.

They are:—

(1) The 1982 Act confers an absolute discretion on the Court whether or not to sanction a scheme but this is a discretion which must be exercised by giving due recognition to the commercial judgment entrusted by the Company's constitution to its directors.

(2) The Court is concerned whether a policyholder, employee or other interested person or any group of them will be adversely affected by the scheme.

(3) This is primarily a matter of actuarial judgment involving a comparison of the security and reasonable expectations of policyholders without the scheme with what would be the result if the scheme were implemented. For the purpose of this comparison the 1982 Act assigns an important role to the Independent Actuary to whose report the Court will give close attention.

(4) The FSA by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on whether policyholders are likely to be adversely affected. Again the Court will pay close attention to any views expressed by the FSA.

(5) That individual policyholders or groups of policyholders may be adversely affected does not mean that the scheme has to be rejected by the Court. The fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected.

(6) It is not the function of the Court to produce what, in its view, is the best possible scheme. As between different schemes, all of which the Court may deem fair, it is the Company's directors' choice which to pursue.

(7) Under the same principle the details of the scheme are not a matter for the Court provided that the scheme as a whole is found to be fair. Thus the Court will not amend the scheme because it thinks that individual provisions could be improved upon.

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

44. In *Re Royal & Sun Alliance Insurance plc* [2008] EWHC 3436 (Ch) David Richards J, having referred to the above authorities, said (at [11])

> "The word "material" is important. The Court is not concerned to address theoretical risks. It might be said that a transfer of business from a very large company to a large company involved a reduction in cover available to the transferring policyholders, but assuming that the transferee is in a financially strong position it matters not that the level of cover in the transferee is less than that in the transferor. What the court is concerned to address is the prospect of real, as opposed to fanciful, risks to the position of policyholders."

45. The importance of the independent expert report has been stressed in a number of cases. In the *Royal & Sun Alliance Case* (above), David Richards J approved the following statement in counsel's skeleton (at [6]):

> "…the court will expect a critical evaluation of the financial strength of all the companies concerned and the security enjoyed by policyholders of the transferors and transferees before and after the scheme."

46. Nevertheless, as pointed out by Briggs J in *Re Pearl Assurance (Unit Linked Pensions) Limited* [2006] EWHC 2291 (Ch), at [6], "the discretion remains nonetheless one of real importance, not to be exercised in any sense by way of rubber stamp". Rimer J, in *Re Hill Samuel Life Assurance Limited* [1998] 3 All ER 176, at 177, said:

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

47. I can deal shortly with the procedural requirements of s.111. I am satisfied that the relevant certificates (required by s.111(2)) have been obtained and that Utmost has the requisite authorisation to carry on the transferred business.

48. I need to say something more, however, about the certificate required by paragraph 3A of Schedule 12 to FSMA. This requires the PRA to provide a certificate that in respect of each contract concluded in an EEA state other than the UK, the authority responsible for supervising persons who effect or carry out contracts of insurance in the EEA state in which that contract was concluded has been notified of the proposed scheme and that: "(a) the authority has consented to the proposed scheme; or (b) the authority has not responded but the period of three months beginning with the notification has elapsed."

49. In *Re The Royal London Mutual Insurance Society Limited* [2019] EWHC 185 (Ch), Snowden J, at [44] to [70], gave consideration to this requirement, with particular

emphasis on when it was permissible to treat such response as might have been obtained from the relevant authority as implicit consent, against the backdrop that sub-paragraph 3A(b) of Schedule 12 introduces a concept of tacit consent through non-response.

50. In its second report the PRA provides details of the level of response, if any, from the 30 EEA regulators who were consulted for the purposes of paragraph 3A. I need not repeat the details contained in that report, which identifies a variety of responses from different regulators: some expressly consented, or stated they had no objection; some provided no response within the time period (so as to engage the tacit consent within sub-paragraph (b)); others requested information, with which they were provided, but thereafter made no further response; and, as to others, there was a varying degree of engagement. In some cases, it was clear that the relevant jurisdiction did not need to be included in the certificate, as no policies were sold under that jurisdiction's regulations and the state of commitment of the policies was not in that jurisdiction. Having considered the responses from each regulator as described in the PRA's second report, I am satisfied that the PRA's certificate complies with the requirements of paragraph 3A of Schedule 12, as explained by Snowden J.

51. In relation to the requirement under s.111(3) (that it is appropriate, in all the circumstances, to sanction the Scheme), I have already referred to the fact that the Transfer Independent Expert, in a series of reports comprehensively addressing all aspects of the Transfer and objections made to it, has concluded that the Transfer will not have a material adverse effect on any of the groups of affected policyholders (those being transferred, those not being transferred, and existing policyholders of Utmost). I have also referred to the fact that neither the FCA nor the PRA objects to the Transfer.

52. In reaching his conclusion the Transfer Independent Expert has considered the impact of the Transfer on the benefit security of transferring policyholders, the benefit expectations of all affected groups, and the quality of service for all policyholders. I will not attempt to summarise his reports (which, together, run to over two hundred pages), or the reports of the FCA and PRA, but will refer to relevant passages in the context of dealing with the objections which have been raised.

Objections to the Scheme and to the Transfer

53. As at 13 November 2019, a total of 60 policyholders had objected to the Scheme alone, 26 policyholders had objected to the Transfer alone, and 34 policyholders had objected to both. This represents less than 0.3% of those policyholders who voted at the Scheme meeting, less than 0.8% of all communications received from policyholders (up to 1 November 2019) and less than 0.075% of all policyholders of Equitable.

54. Equitable has communicated on a regular basis with the PRA, the FCA, the Policyholder Independent Expert and the Transfer Independent Expert in relation to objections as they have been received, and each of the experts, the PRA and the FCA have – in their respective reports – addressed the objections made in detail. None of the objections have caused any of them to change their opinion in relation to the Scheme or the Transfer. As I have already indicated, however, the decision to approve the Transfer and to sanction the Scheme is one for the court alone. It is for

me, therefore, to consider whether any of the objections carry sufficient weight to lead me to refuse to sanction the Scheme or the Transfer.

55. Accordingly, neither the relatively small number of objections, nor the views of the experts and regulators, replaces the need for the court to consider the objections on their merits. I will address, first, the larger objections, most of which were raised by those who either attended court or requested that the court read their correspondence.

The Prudential/Rothesay Decision

56. The first objection arises out of the recent decision of Snowden J in *Prudential Assurance Company Limited* [2019] EWHC 2245 (Ch) in which he declined to sanction an insurance business transfer scheme under Part VII of FSMA from Prudential Assurance Company Limited to Rothesay Life Plc (the "Prudential/Rothesay Case").

57. His conclusion was based principally on the summary contained at [180] to [182] of his judgment:

> "180. The purchasers of annuity policies such as those in the instant case make a significant investment of some or all of their pension pots, and have no option to change the insurer upon which they will be dependent for life. In that context, it was entirely reasonable for policyholders to have chosen PAC as the provider for their annuities based upon its age, its established reputation and the financial support which it would be likely to receive from the accumulated resources of the wider Prudential group if the need were ever to arise. I also consider that in light of the way in which their policies were described in the relevant documents, and in the absence of any clear statement to the contrary, it was entirely reasonable for policyholders to have assumed that PAC would not seek to transfer their policies to another provider. These factors mean that the choice of policyholders to take their lifetime annuities from PAC itself carries significant weight.
>
> 181. In contrast, in terms of the criteria that the opposing policyholders relied upon to select their annuity provider, Rothesay is very different from PAC. It is a relatively new entrant without an established reputation in the business. Although it may currently have SCR metrics which are at least equal to those of PAC, it does not have the same capital management policies or the backing of a large group with the resources and a reputational imperative to support a company that carries its business name if the need were to arise over the lifetime of the annuity policies. I cannot dismiss as fanciful the possibility that such support may be required over the very long duration of these policies, and I consider that the reliance which policyholders would then have to place upon an uncertain capital raising exercise from the investors in Rothesay or the

> markets more generally, is a material disadvantage of the Scheme to Transferring Policyholders.
>
> 182. On the other side of the balance, PAC's reasons for selecting the Transferring Policyholders were entirely driven by a need to release regulatory capital to support the proposed Demerger. PAC has achieved that commercial objective by the Reinsurance Agreement, which will continue even if the Scheme is not sanctioned. PAC and Rothesay could not presume that the Scheme would be sanctioned, and I do not regard the additional costs which they will incur, or the fact that Rothesay will not have the commercial opportunity to use different techniques to exploit the assets which support the Transferring Policies, are significant prejudice when set against the fundamental change in status and material disadvantage that they seek to impose on the Transferring Policyholders."

58. Mr Moore QC told me that there is a pending appeal against the decision of Snowden J. He did not, however, attempt to persuade me that the decision is wrong. Rather, he submitted that it is clearly distinguishable on the facts from the case before me. I agree. There are at least the following distinguishing features which render Snowden J's conclusion and reasoning in the Prudential/Rothesay Case inapplicable in the circumstances of the Transfer from Equitable to Utmost:

i) Snowden J placed emphasis on the fact that the policyholders of the Prudential could not change annuity provider. If the transfer went ahead, that would mean that "the annuitant will, like it or not, become bound to Rothesay for life": see [126] of his judgment. That is not the case here. The vast majority of business to be transferred will comprise unit-linked policies. Policyholders will be free to transfer these to another provider (initially, at least, without charge) following the Transfer.

ii) Snowden J also relied on the lack of commercial justification for the transfer, given that the economic risk and reward had already passed from the Prudential to Rothesay pursuant to a reinsurance agreement. In contrast, the Transfer to Utmost is an essential element in achieving the overall commercial aim, as described at paragraph 20 above.

iii) Moreover, in further contrast to the position in the Prudential/Rothesay case, the Scheme and Transfer are intended to benefit the with-profit policyholders as a whole, by avoiding the unfairness inherent in the tontine effect and cost inefficiencies if the run-off continues within Equitable.

iv) Whereas the transfer in the Prudential/Rothesay case was to a new entrant to the market from a company within a long-established group of high reputation, so that the transferor could look to its parent for capital support if needed, Equitable, as a stand-alone mutual company, is not in that position. In contrast, Utmost will have access to its parent group for capital support, as is apparent from the fact that such support in the sum of approximately £150 million is being provided at the outset.

v) Finally, while it is true to say that – as in the Prudential/Rothesay case – the Transfer itself has not been approved by policyholders, the Transfer here is part of proposals which have received overwhelming support from those transferring policyholders who voted in favour of the Scheme.

Matching Adjustment

59. I heard from one policyholder, Dr Dean Buckner, who objected on the basis that Utmost does (whereas Equitable does not) make use of "matching adjustment" in calculating its Solvency Capital Requirement ("SCR") in accordance with the requirements of the recast Directive 2009/138/EC ("Solvency II").

60. As explained in the second report on the Transfer from the PRA, UK insurers are subject to a prudential regulatory requirement to invest assets covering their insurance liabilities in a manner appropriate to the nature and duration of those liabilities.

61. In valuing annuity liabilities, insurers will first determine the expected future cash-flows under the policies they have written and then discount them to give a present value. The starting point is to use a "risk free rate" (such as that payable on government gilts).

62. Solvency II, however, provides that insurers matching certain long-term liabilities with assets that they can buy-to-hold may seek regulatory approval to value those liabilities using a "matching adjustment". This allows an insurer to value its insurance liabilities using a discount rate that is higher than the risk-free rate. The rationale is that the return from certain long-term assets includes an element that compensates the investor for the market illiquidity of the asset. An insurer intending to hold the asset to maturity (to match a long-term liability) will not, however, be exposed to illiquidity risk. In short, an element of the return on the asset is to benefit the insurer-investor for a risk that it is not exposed to.

63. All else being equal, the practical consequence is that, in respect of a firm using matching adjustment, the value of its insurance liabilities is reduced so that it is required to hold less capital than if it did not use matching adjustment.

64. Mr Weitzman QC, who appeared for the PRA, submitted that matching adjustment more appropriately reflects the risks to which firms are exposed and benefits policyholders as well as firms, in that it enables an insurer to offer annuities at lower prices. He also stressed that there are strict eligibility criteria which must be satisfied (subject to the approval of the PRA) before a firm can use matching adjustment.

65. Dr Buckner has considerable experience in the field, having worked for most of his career in bank and insurance capital management, including for the Bank of England where he worked as a senior technical valuation specialist in the Insurance Department until his retirement in May 2018.

66. In a series of three written submissions and in oral submissions made at the hearing, he mounted a root and branch attack on matching adjustment. He described it as a "scientifically unsound" practice that artificially created capital. He referred to excerpts from articles by other economists, which expressed opinions including that "the only appropriate way to calculate the value of a very low-risk liability is to use a

very low-risk discount rate"; and that "if a liability is issued on the expectation or promise that it is risk free, then it must be discounted at the risk free rate, otherwise we descend into nonsense."

67. Specifically, he objects that Utmost's balance sheet is "propped up by £97 million in non-existent capital".

68. The Transfer Independent Expert, in his supplementary report, has analysed the anticipated solvency position of Equitable and Utmost (pre- and post- Transfer) on the basis of Solvency II, calculated as at 30 June 2019. The most important figure, for the purposes of testing each company's resilience to insolvency risk, is the ratio of Eligible Own Funds to the higher of the Solvency Capital Requirement or the Minimum Capital Requirement (referred to as the "SCR Ratio").

69. As I have noted above, it is a condition of the Scheme and, effectively, the Transfer that Utmost receives a capital injection to ensure that its SCR Ratio is 150%.

70. As Mr Moore QC points out, these solvency metrics need to be seen in their proper context. The solvency requirements for an insurance company start with the quantification of best estimate liability, which represents the present value of future liability cash flows on a realistic basis, i.e. what is required to pay all sums due over the life of a policy. To that amount is added the risk margin which broadly reflects what would have to be paid to another insurer to take over the policies and run them off. Accordingly, even before amounts are set aside to cover the SCR derived from Solvency II there is a high degree of practical protection to policyholders in terms of the assets a firm must hold.

71. There are two capital requirements under Solvency II: the Minimum Capital Requirement (MCR) and the SCR. The MCR tends to be set lower than the SCR for all but the smallest of firms. The SCR is more bespoke. It is calculated at an amount necessary to ensure that there is a 99.5% likelihood that the firm can pay its liabilities over the next year. To put it another way, the Solvency II requires insurers to maintain capital reserves so that they can survive extreme events that are expected to occur only once in every 200 years. The SCR and SCR Ratio are calculated every year on a rolling basis.

72. Each firm will apply, in addition, its own capital policy, requiring it to take action when its SCR Ratio falls below a pre-determined percentage. In the case of Utmost, its capital policy will require it to maintain its SCR Ratio at a minimum of 150%.

73. The practical effect of the above is as follows:

i) A relatively large decrease in the SCR Ratio, for example from 170% to 155%, is in fact a very small decrease in the probability of remaining solvent over the course of the following year (given that 100% SCR is a 99.5% probability: see *Re The Prudential Assurance Company Limited* [2018] EWHC 3811 (Ch) at [45]–[47]).

ii) Little weight can be given to any level over the SCR because (a) an insurance company is entitled to do as it pleases with any such excess (see *Re HSBC Life (UK) Limited* [2015] EWHC 2664 (Ch) at [46]) and (b) there is no principled basis upon which to determine what is an appropriate amount of excess (see *Re Rothesay Assurance Limited* [2016] EWHC 44 (Ch) at [33]–[39]).

74. In his supplementary report, the Transfer Independent Expert identifies the SCR Ratios as:

    i) For Equitable, 120% prior to the Scheme and 125% after the Scheme and Transfer; and

    ii) For Utmost, 168% prior to the Scheme and 150% after the Scheme and Transfer.

75. On the basis of those figures, I consider that the Transfer Independent Expert's conclusion that the Transfer will have no material adverse effect on the benefits security of the transferring policyholders is justified.

76. Dr Buckner, however, contends that the true SCR Ratio for Utmost prior to the Scheme and Transfer (that is, without applying matching adjustment) is only 21%. His objection, therefore, is both that there is a significantly greater insolvency risk in respect of Utmost than there is in relation to Equitable, and that there is in any event, in respect of Utmost, an unacceptable level of insolvency risk.

77. Mr Weitzman QC, for the PRA, submitted that the objections raised by Dr Buckner are not suitable for determination by the court on this application for sanction of the Transfer. Matching adjustment is something that has been given statutory effect in this country. It is the product of consultation with interested parties and careful consideration by the legislator. Dr Buckner's objection is really directed at the legislator for having introduced the concept into legislation and at the PRA for its support of the use of matching adjustment. Whatever may be the proper forum for that challenge, it is not an application to sanction this Transfer. Mr Weitzman also submitted that even if it was appropriate for this court to consider the substance of Dr Buckner's objections, it was impossible to reach a determination. That is because the question involves complex matters of economic and actuarial theory, the resolution of which would require evidence from relevant experts, whose evidence would need to be tested by cross-examination. It is not sufficient to be shown extracts from articles written by persons, irrespective of their expertise, who were not before the court.

78. Mr Moore supported the PRA's stance on this point. He submitted that I am required to exercise my discretion under Part VII of FSMA against the background of the regulatory regime as it exists, not as someone would like it to be.

79. An issue that is undoubtedly a question for the court to consider on this application is the solvency risk of the transferee. While the *relative* risk as between the transferor and the transferee is a factor to consider, the essential question (in the words of David Richards J in the *Royal & Sun Alliance* case cited above) is whether the Transfer creates the "prospect of real, as opposed to fanciful, risks to the position of policyholders". That is why a transfer from a very large entity to a large entity may result in a relative reduction of SCR Ratio but would not in itself lead to the prospect of risk in the relevant sense.

80. So far as transferring policyholders are concerned, on the basis of the SCR Ratios contained in the report of the Transfer Independent Expert, while there is an *increase* in SCR Ratio from 120% (Equitable, pre-Scheme) to 150% (Utmost, post-Transfer), it is accepted that Utmost's SCR Ratio prior to the Scheme and Transfer, if measured without use of matching adjustment, would be substantially reduced (although this has not been verified by the PRA, it appears that it would be in the region of 64%). There is no equivalent figure for Utmost's SCR Ratio without matching adjustment after the Scheme and Transfer, but I note that it is likely to be substantially higher in view of the fact that the transferring business – which is not subject to matching adjustment – is approximately four times higher than the size of Utmost's existing business. As I have indicated, however, the critical question is whether this poses a real risk to the position of transferring policyholders.

81. In considering Dr Buckner's objection it is relevant to note that he is the only policyholder to have advanced this objection. His submissions to the court on this application reflect a wider campaign by him, and others (as evidenced by newspaper articles he brought to my attention), to persuade the PRA and the legislator against the use of matching adjustment.

82. I also take into account that it is doubtful whether Dr Buckner would himself be adversely affected in the event of Utmost's insolvency. Equitable holds reinsurance matching its liabilities towards Dr Buckner. The benefit of that reinsurance will be transferred to Utmost. There is a contractual provision in the reinsurance agreement that the regulator can require the reinsurer to make a covered payment direct to the policy holder in the event of Utmost's insolvency. While this 'cut-through' right does not remove all risk (the PRA point out, for example, that the enforceability of the contractual provision in the reinsurance agreement has not been tested in court, and while there is no reason to think that Utmost would commute the reinsurance policy, they have not given a guarantee in this respect), it is notable that no objection on the basis of the matching adjustment provision has been made by any policyholder directly affected by it.

83. In my judgment, in agreement with the submissions of Mr Weitzman and Mr Moore, in considering whether Utmost satisfies the solvency criteria laid down by Solvency II, I must apply the regulatory regime as it exists, and it is not for me to go behind the requirements embodied in legislation (even if it were possible for me to reach a concluded view on Dr Buckner's objections to matching adjustment, which it is not in the absence of hearing evidence from competing experts presented for cross-examination on their opinions).

84. Applying the regime as it exists, I am satisfied on the basis of the conclusions set out in the Transfer Independent Expert's reports (which I consider are well-reasoned and supported by the detailed explanations set out in them) that the Transfer does not pose a sufficient risk to the benefit security position of transferring policyholders to warrant declining its sanction.

Independence of the independent experts

85. Dr Buckner, echoing an objection of some other policyholders, was concerned as to the true independence of the Transfer Independent Expert and the Policyholder Independent Expert.

86. The only reason advanced for doubting the independence of the experts is that their fees are paid by Equitable. Where, as here, the experts' appointment is approved by, respectively, the PRA and the FCA and they have expressly acknowledged their independence and their primary duty to the court, the fact that their fees are paid for by Equitable is not a reason to doubt their independence: see *Re Allied Dunbar Assurance PLC* [2005] EWHC 28 (Ch), per Evans-Lombe J at [15] to [18].

87. Dr Buckner contends, in addition, that the experts do not have the necessary expertise. He suggests that, as actuaries, they will have had insufficient training in modern financial theory to equip them to provide informed opinions. While accepting this as a genuinely held concern on the part of Dr Buckner, I do not think that his opinion on this issue should outweigh the combined views of the FCA and PRA as to the suitability of the experts appointed in this case.

Objections of Mr Christopher Gibbons

88. I heard from Mr Chris Gibbons, representing himself and his wife as policyholders. Although Mr Gibbons is a practicing barrister, his appearance in this case was as a litigant in person. He asked me to take into account that he was aware of a number of his colleagues who were in a similar position to him, having acquired with-profits policies with Equitable.

89. His first objection (which related to the Transfer) was as to the lack of gender equality on the board of Utmost. Without diminishing the importance of diversity on the board of an insurance company, I do not think that this is a reason to refuse to sanction the Transfer. I was informed by Mr Moore that Utmost is in any event taking steps to address this point. Mr Gibbons also expressed concern that Utmost is under the ultimate control of a company incorporated in the Cayman Islands, but (rightly, in my judgment) did not press any specific objection to the Transfer on this basis.

90. More substantively, he objected to the fact that there appeared to be approximately £140m in what he referred to as "dormant accounts" which it was intended to exclude from the distribution of capital by way of uplift in policy values. This is an objection to the terms of the Scheme.

91. Mr Moore explained that this sum is held in respect of policyholders with whom Equitable has currently lost contact (there being no current address), as opposed to where the policy has matured and the holder has failed to claim benefits or died. In the latter case, the relevant amount was said to be approximately £1 million in aggregate. In the former case, however, there is not sufficient certainty that policyholders would not claim their benefits when they matured. Mr van Sante, who appeared for the FCA, explained that the FCA has put in place regulatory requirements that oblige Utmost to take reasonable efforts to find the relevant policyholders. Irrespective of those efforts, if a policyholder does eventually claim their benefits, then Utmost would be required to pay out. Accordingly, I accept the submission (supported by the FCA) that the non-distribution of the £140 million does not render the Scheme unfair or otherwise provide a ground for refusing its sanction.

92. Finally, Mr Gibbons expressed concern that the costs of Freshfields (solicitors to Equitable) were not subject to assessment, notwithstanding the very large sums

involved. He contrasted this with the meticulous approach taken to assessment of very much smaller sums involved in legal aid cases. As to this, there is no legal requirement that the advisors' costs be subject to assessment. It is, as Mr Moore submitted, a matter for the commercial judgment of the board of directors of Equitable. Accordingly, I do not think that the absence of assessment of costs is a reason to refuse to sanction the scheme.

Objections of Mr Michael Johnson

93. I heard from Mr Michael Johnson, who had expressed concern in correspondence that on the basis of figures presented to him it appears that approximately 11% of the with-profits fund, by value, was not being distributed. These figures had, however, been presented to him as an illustration at a time when Equitable had in place hedging arrangements, the liabilities associated with which reduced the available assets for distribution. Since that date, as a result in particular of the fact that the hedging liabilities will be terminated on implementation, the part of the fund which is needed to meet liabilities has been significantly reduced. It is, of course, an unavoidable consequence of the existence of liabilities which are borne by the fund, that the value of distributable assets is reduced by those liabilities. There is no question, in my view, of assets being arbitrarily withheld from distribution to policyholders. In any event, I understood that Mr Johnson's concerns were largely if not completely addressed by the explanation given in relation to the figures.

94. I record that otherwise Mr Johnson wishes the proposal to go ahead, and expressed his agreement with what Equitable was seeking to achieve by it.

Objections of Mr Gareth Jones

95. I heard from Mr Gareth Jones, another with-profits policyholder. He objected to the Scheme on the basis that it would render him worse-off.

96. He is a younger policyholder (being aged 54) with the benefit of a GIR of 3.5%. He relied on illustrations provided to him by Equitable. The first of these was an illustration of the projected value of his benefits, with and without the Scheme, upon reaching 65. In either case, the projected value was given on the basis of a medium rate, a higher rate and a lower rate. His specific complaint is that on the basis of the lower rate, the projected value was lower, under the Scheme, than if the Scheme did not go ahead.

97. The second of the illustrations was a projection of values at age 75. His complaint was, again, that on the basis of the lower rate the projected value was lower (this time considerably lower) under the Scheme. In addition, on the basis of the medium rate, the projected value was (marginally) lower under the Scheme.

98. He says that he takes a cautious approach to investment risk and that on the basis of Equitable's own projections of outcome based on such a cautious approach, he will be worse off. In these circumstances, it is unfair to take away his GIR (which would have seen his fund value grow at 3.5% per annum).

99. As I have indicated above, the potentially different effect on different policyholders of the removal of GIR was expressly taken into account by Norris J in reaching his

conclusion that a single meeting of policyholders was appropriate. Mr Jones' complaint goes, however, to the fairness of the Scheme.

100. It is important, in my judgment, to view the projections provided to Mr Jones in light of two considerations. First, it is the medium rate that reflected Equitable's prudent projection of return. The higher and lower rates are required to be included, by regulation, in order to show a rate that is at least 3% higher and one that is at least 3% lower (which are then adjusted to reflect inflation at 2%). The lower rate does not, therefore, reflect Equitable's view as to likely value. Second, given the relatively low rates adopted in arriving at the medium rate, the regulatory requirement to show a rate that is 3% lower can have the effect of producing an artificially negative rate. In relation to the money market fund, for example, it results in a rate of -2.25% (before adjustment for 2% inflation). As Mr Moore suggested, it is highly improbable that a cash fund would pay -2.25% interest.

101. Accordingly, in light of these two points, the possibility that Mr Jones' policy value would – whether at aged 65 or 75 – be lower with, as opposed to without, the Scheme is based on an investment approach which is ultra-cautious and, in some respects, unrealistic.

102. Mr Moore's principal response to Mr Jones' objection is that the court's task is to assess the fairness of the Scheme overall for all policyholders. The fact the fairness indicators are satisfied in the vast majority of cases and that, where they are not, the relevant policyholders are compensated by the fairness adjustment, demonstrates the overall fairness of the Scheme. It would be wrong, Mr Moore submitted, to reject that conclusion on the basis of a policyholder who could point, on the basis of a subjective approach to investment risk that was so cautious as to be objectively unreasonable, to a scenario where he would be worse off as a result of the Scheme.

103. I broadly accept Mr Moore's submission, although I do not think it is necessary to characterise Mr Jones' approach to investment risk as objectively unreasonable. It is sufficient to cite two things. First, that the possibility that he might be worse off under the Scheme is based on projections which are the product of a regulatory requirement to provide an illustration at 3% below Equitable's own projection and, given the low starting point, is as such an unlikely outcome. Second, that such a projection falls outside the fairness criteria, and adjustment, which are designed to cater for reasonably anticipated variations in outcome.

104. The essential question is whether I think that because someone in Mr Jones' position (a younger policyholder with a cautious approach to investment) may have a greater risk of being adversely affected by the loss of GIR means that the Scheme as a whole is unfair. For the reasons I have summarised above, I do not think it leads to that conclusion.

105. I should add that in relation to the illustration showing a projection at age 75, while this indicates that the outcome under the Scheme would be slightly lower on the medium rate, I do not think that this is sufficiently material to lead to the conclusion that the Scheme as a whole is unfair and should not be sanctioned. I take into account the fact that the difference is very small, and that the length of time over which the projection extends (21 years) is very long and thus inherently less certain.

Objections of Mr Beddow

106. I also heard from Mr Mark Beddow whose complaint was that he was not entitled to vote at the meetings (i.e. the Scheme meeting and the extraordinary general meeting of Equitable) despite being a member of the society. Equitable's answer is that Mr Beddow was in fact not a member of Equitable, the corporate entity, since the Articles of Association of the company identify as members only those who hold with-profits policies (which Mr Beddow did not). The version of the Articles which was in evidence post-dates Mr Beddow acquiring his policy. Nevertheless, I would be very surprised if the fundamental matter of defining who was a member had changed over time.

107. In any event, Mr Beddow moved his policy to another provider on 29 October 2019 and accordingly ceased to have standing to object to the Scheme or Transfer.

Objections of Mr Alan Coxon

108. Mr Alan Coxon was unable to attend court, but supplied extensive written submissions in which he objected to the Scheme and the Transfer. In a letter dated 17 November 2019 he set out a number of substantive concerns of direct relevance to the sanction hearing. I have also read letters from Mr Coxon dated 28 June 2019 and 3 July 2019, which contained objections for the purpose of the Convening Hearing. So far as he objects to the sanction of the Scheme and Transfer, his principal complaints appear to be the following.

109. First, he contends that the Scheme is unnecessary since Equitable is solvent. Relying on a table produced by Equitable in the "Introduction to the Scheme Booklet" he contends that what is being given up under the Scheme is significantly more valuable than what is being offered. The short answer to this 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 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.

110. Mr Coxon also speculated that Equitable is in fact insolvent, in which case policyholders should have no fear of it being wound-up, because the FSCS would protect policyholders. I am satisfied, however, that Equitable is not insolvent.

111. Second, Mr Coxon contends that the removal of GIRs is a breach of contract and unjust. He says that it is wrong to set one policy holder against another. The essence of the long-established jurisdiction under what is now Part 26 of CA 2006, however, is that it enables contractual rights to be overridden provided the requisite majorities are obtained.

112. Third, Mr Coxon objects to there being only one class. He reiterates points that were made in his correspondence provided to the court prior to the Convening Hearing. He points, in particular, to the differences between levels of GIR. He also says that a personal pension plan has different attributes to other contracts written by Equitable.

As I have indicated above, questions concerning class composition were explored by Norris J at the Convening Hearing and in the absence of different arguments being presented to the court at the sanction hearing, I do not think it necessary to re-open the question. In any event, the fact that there may be differences between different types of policy does not lead to the conclusion that there should be multiple classes. The differences pointed to by Mr Coxon do not make it impossible, as Norris J pointed out, for the policyholders to consult together in their common interests.

113. Mr Coxon says that there was no realistic opportunity to "consult" with other policyholders, given the numbers involved. It is true that the possibility of real consultation among creditors is often illusory. The focus of the test, however, is not on the practicality of actual consultation, but on whether the differences in rights are of a sort which would make it impossible for creditors to consult together in their common interests if it was *practically* possible to do so.

114. Fourth, Mr Coxon challenges the validity of the vote at the Scheme meeting, given the low turnout. Mr Coxon speculates whether policyholders did not engage because they did not understand the Scheme or thought that objection was pointless. I have addressed this point above. For the reasons there given, I do not think that the low turnout is a reason to refuse to sanction the Scheme.

115. Fifth, Mr Coxon questions why, if Equitable is compliant with Solvency II, it has been unable to find another insurer to take on the contractual liabilities *unaltered*. Equitable has provided a detailed explanation of the alternatives that it considered to the Scheme and Transfer, each of which was considered unacceptable. The possibility of a sale of the business to another insurer was one of the possible alternatives, but rejected because the need to provide capital to support investment guarantees over uncertain durations had previously discouraged potential purchasers and the cost of incurring another sale process was thought not to be in the interests of policyholders. The Policyholder Independent Expert has considered the same alternatives and concluded that the Scheme is the most appropriate way forward.

116. Sixth, Mr Coxon objected to a statement in the first report of the Policyholder Independent Expert that executive management had no financial incentive in relation to the outcome of the Scheme. He points to the fact that within Equitable's statutory accounts it is stated that bonuses payable to directors, but previously deferred, will be paid immediately before the Transfer. He says that this error raises the question as to what else is incorrect in the Scheme documentation. I do not regard the payment, now, of deferred bonuses as the kind of financial incentive to management to which the expert was referring. Accordingly, it does not amount to an error in the expert's report, or otherwise call into question the accuracy of the documentation as a whole.

117. The correspondence from Mr Coxon covers approximately 50 pages. I have read his letters, and the responses provided to him by Freshfields. Insofar as I have not addressed any of his concerns specifically in the above paragraphs, I am satisfied, for the reasons given in Freshfields' responses to him, that they do not provide sufficient reason to refuse to sanction either the Scheme or the Transfer.

Remaining objections

118. I do not propose to deal individually with the other objections which have been raised by one or more of the policyholders. These relate, broadly, to the following concerns:

i) The structure, lack of history and lack of information concerning Utmost and its parent group;

ii) The selection process which led to the identification of Utmost as transferee;

iii) The Scheme and Transfer are being forced on policyholders who have little option to opt-out;

iv) The lack of information, and the charges, relating to the fund choices;

v) The overwhelming complexity of the information provided;

vi) The cost of the process, with particular emphasis on the cost of the provision of advice to policyholders;

vii) The timing of the transfer, given the poor exchange rate and depressed markets resulting from the proximity of Brexit.

119. As to the third of these points, while it is an inherent aspect of the statutory procedure that policyholders are not permitted to vote on the Transfer, they do have the right (and some have exercised it) to voice their objections to the court, many of them had the opportunity to vote on the Scheme and (as I have noted above) they will in most cases have the opportunity to transfer their policies to another provider, post-implementation, at no cost.

120. As to the fifth point, the Scheme and Transfer are inherently complex, and it is necessary to provide full information to policyholders. While I recognise the difficulties many will have in taking in such a large amount of information, I consider that the efforts made by Equitable to provide a summary of the material information, in the Explanatory Booklet sent to policyholders, were sufficient to enable policyholders to acquire a reasonable understanding of the proposal.

121. As to the sixth point, the concern is that a substantial amount has been spent on making advice available, but the take-up rate has been very low. Even if the cost was for this reason excessive, it is not a reason to refuse to sanction either the Scheme or the Transfer. I consider in any event that it was appropriate to make the advice available.

122. All of the objections raised have been addressed not only by each of the experts but also by the FCA and PRA, all of whom have expressed the view that the objections raised have not caused them to alter their conclusions as to the Scheme and the Transfer.

123. Insofar as they do not replicate the points I have specifically dealt with above, I am satisfied, having read the responses to them in the reports of the FCA, the PRA and the Transfer Independent Expert and the Policyholder Independent Expert, that none of the further objections made provides a reason not to sanction the Scheme.

124. After the conclusion of the hearing, my clerk received an email from a Mr David Thrower, indicating that he was a past member of Equitable and contending that he and other ex-members ought to be included now that a new surplus had emerged. He says that a complaint has been lodged with the FCA, who have responded by saying they will investigate once the High Court has ruled on the Scheme and Transfer. Whether or not Mr Thrower, or other former members, have any rights in this regard (about which I express no view) there is nothing in his email which would lead me to refuse to sanction either the Scheme or the Transfer.

125. I need to consider objections raised by one other policyholder, Dr Stylianos Rafailidis, but since they relate to the treatment of German policyholders, I will deal with them when addressing that part of the Transfer in more detail, to which I now turn.

German policyholders

126. I have outlined the provisions of the Transfer which deal with the German With-Profits Policyholders above. In essence, these involve the establishment of a new ring-fenced with-profits sub-fund within Equitable (which will become a subsidiary of Utmost).

127. The UK Style German With-Profits Policyholders will be allocated an uplift that mirrors the primary uplift under the Scheme. They will, however, retain the benefit of investment guarantees. The sub-fund will bear the burden of all liabilities of German With-Profits Policyholders, except that the liabilities under investment guarantees will be borne by the Equitable Main Fund, pursuant to a reinsurance arrangement between the German With-Profits Fund and the Main Fund.

128. There are two possible bases of jurisdiction for the treatment of German Policyholders: the provisions are part of the Scheme itself; or they are the subject of ancillary directions given by the court under s.112(1)(d) of FSMA 2000. That section provides that, if the court makes an order under s.111(1), it may make such provision as it thinks fit "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."

129. In *Re Norwich Union Linked Life Assurance Ltd* [2004] EWHC 2802, Lindsay J approved the following comments of Knox J in *Re Hill Samuel Life Assurance* (unreported, 10 July 1995), as to the meaning of the word "necessary" in s.112(1)(d):

> "Equally, it might be said that the word in the paragraph is 'necessary' rather than 'desirable'. 'Necessary' does not stand by itself in that paragraph. The phrase is:
>
> > '… necessary to secure that the scheme shall be fully and effectively carried out'.
>
> Although 'necessary' is somewhere in the middle between 'vital' on the one hand and 'desirable' on the other, if it used in the phrase 'necessary to secure that the scheme shall be fully and effectively carried out' and it extends to consequential and supplementary matters, it would seem to me legitimate for the

> Court to conclude within the ambit of a scheme which it approves something which will give the full benefit of the scheme to one or other of the two units that are being amalgamated. In that sense it seems to me that although this is certainly not a matter which is vital to the approval of the scheme – and, indeed, there is specific evidence to that effect – it nevertheless is something which is within the jurisdiction of the Court to approve and on that basis I do approve it."

130. Subsequently, Henderson J, in *Re Alliance & Leicester PLC* [2010] EWHC 2858 (Ch), said:

> "the word [necessary] has to be read in the context of the phrase as a whole, so that if a step is necessary in order to implement the scheme in an effective and commercially sensible way, it will be perfectly proper to make an order under section 112 for that purpose."

131. In some cases, that which might be described as incidental to the scheme can more appropriately be characterised as a part of the scheme itself: see the *Norwich Union* case, per Lindsay J at [11]:

> "For my part, I would thus start from a position in which it is no necessary requirement of an IBTS that, whilst effecting a transfer of the kind provided for in s.105, it should do nothing else. Indeed, I see the line (if there is one) between that which, incidental or supplementary to or consequential upon the transfer in the scheme, may be within the scheme itself and what, at the time of the scheme or later, can only be authorised under s.112, as being unclear. This is not to say that the contents of an IBTS are boundless; its predominant purpose must be to result in one or more transfers of the described kind. Moreover, it may be (though I do not need to decide and do not decide this issue) that only such supplemental provisions can be within an IBTS as could be authorised under the more liberal view taken of what is "necessary" under s.112(1)(d) . However, there are good reasons, if the proponents of a scheme from the outset see the need for a given supplemental provision, that it should be included within the scheme itself. That is what has been done in the case at hand. In that way policyholders have a four-fold protection; the supplemental provision comes within the purview of the FSA, it is reported on by the appointed Independent Expert, is explained to members and is required to obtain the sanction of the court as being "appropriate". By contrast, a subject dealt with only outside the scheme under s.112(1)(d) (but at the same time as the scheme or later), as it requires only the sanction of the court under s.112, leaves those who might be affected by it unprotected in the other three ways. If the proponents of the scheme are in doubt as to which jurisdiction, s.111(1) or s.112(1)(d) , is relevant they can, again as was done here, in effect invoke both."

132. In *Re Reassure Life Limited* [2016] EWHC 3656 (Ch), the court was asked to approve, in the context of the transfer of insurance business from the transferor to a new ring-fenced fund of the transferee, the transfer of a separate existing book of business of the transferee into that same ring-fenced fund (the "secondary transfer"). Norris J, having referred to the above authorities, concluded that it was appropriate to approve and sanction as part of the Part VII transfer scheme the amendment to the transferee's scheme that resulted in the secondary transfer.

133. In the present case, the relevant provisions of the Transfer require Equitable to establish the ring-fenced sub-fund and to credit assets and liabilities relating to the German With-Profits Policyholders to the new sub-fund. Mr Moore QC explained that the reason for requiring these matters to be set out in the Transfer, or done pursuant to a direction of the court under s.112(1)(d), was to ensure for the benefit of the policyholders that the regime could not be altered. Save for a potential argument under German law that the creation of the German With-Profits Fund and/or the removal of their membership rights constitutes a breach of their contractual rights under German law (which Equitable believes there would be a reasonable prospect of successfully defending and which would in any event be unlikely to lead to demonstrable loss) these measures do not involve any alteration in the rights of the policyholders.

134. An objection was made to the provisions relating to the German With-Profits Fund by Dr Stylianos Rafailidis. He was unable to attend court, but provided detailed written submissions, objecting to the Transfer, dated 16 October 2019, 4 November 2019 and 17 November 2019.

135. Dr Rafailidis is a German With-Profits Policyholder. He also holds a unit-linked policy and a non-profit policy. His principal complaint is that as a result of a reinsurance arrangement which is to be put in place between the main fund and the German With-Profits Fund, the policyholders in the main fund will be responsible for any shortfall in the With-Profits Fund. He contends that this is a breach of the terms of his policy which prohibit "any transfer to the policyholder of such payment liabilities".

136. In a letter dated 21 November 2019 from Freshfields, it is pointed out that the proposals do not impose any liability on Dr Rafailidis or any other policyholder. Rather, they simply require the Main Fund to cover any shortfall in guarantee obligations of the policyholders within the German With-Profits Fund. The potential for prejudice to policyholders in the Main Fund is linked to the solvency position of Equitable.

137. The Transfer Independent Expert has reviewed the impact of the Transfer on non-transferring policyholders. He noted in his supplemental report that, whereas Equitable's capital coverage ratio was 120% prior to the Scheme, the capital coverage ratio of the Equitable main fund after the Transfer will be 207% and that of Equitable as a whole (including the German With-Profits Fund) will be 125%. It is true that Equitable will be substantially smaller post-Transfer and that its capital coverage ratio is therefore expressed, post-Transfer, as a ratio of MCR. He noted, however, that Equitable will continue to hold only the highest quality (Tier 1) of capital and concluded that the non-transferring policyholders (which includes those within the Equitable main fund post-Transfer) would continue to be held in a company that

meets Solvency II capital requirements and in line with capital targets under the proposed post-Transfer Equitable capital policy. As such, he was satisfied that the Transfer would not have a materially adverse effect on the benefit security of non-transferring policyholders.

138. Dr Rafailidis' other principal complaint is that Equitable's amended Articles of Association provide that the members of the company (i.e. Utmost, post-Transfer) are not liable for any debts of the company. That, he says, is inconsistent with Freshfields' explanation to him that "all liabilities, including potential claims and litigation in relation to the Transferring Policies would Transfer to Utmost". His objection in this respect is based on a misunderstanding of the effect of the Articles. As Mr Moore pointed out, they do not override the fundamental consequence of the Transfer, namely that Utmost both acquires the assets and assumes the liabilities of the transferring business.

139. Accordingly, I am satisfied that notwithstanding Dr Rafailidis' objections, it is appropriate to sanction the Transfer, including the provisions relating to the establishment of the German With-Profits Fund.

140. I note that these provisions are essential to achieving the objectives of the Scheme, which requires a distribution of excess capital to policyholders in order to avoid the tontine building up. The Scheme is itself essential to the Transfer, since Utmost is only prepared to acquire the business once the policies are transformed into unit-linked policies. In these circumstances, I marginally prefer the solution that the relevant provisions (i.e. those contained in paragraphs 13, 16 and 17 of the Transfer) are approved as part and parcel of the Transfer, as opposed to a separate direction under s.112(1)(d).

Conditionality

141. A further matter brought to my attention by Mr Moore is that the coming into effect of the Scheme (and thus of the Transfer) is conditional upon what has been referred to as the "Capitalisation Requirement" being satisfied prior to the Implementation Date. The Capitalisation Requirement means that Utmost should have Eligible Own Funds (as defined in the Scheme) equal to the higher of its MCR or 150% of its SCR.

142. Equitable has obtained a parental guarantee of Utmost's obligations in this regard pursuant to a Business Transfer Agreement dated 14 June 2019 between Equitable, Utmost and Utmost's ultimate parent company OCM LCCG Holdings Limited ("OLHL"). That parental guarantee is supported by an equity commitment letter between OLHL and the ultimate owners of the Utmost group, being funds managed by Oaktree Capital Management. That letter provides that the Oaktree Funds' obligations under it can be enforced by Equitable and Utmost on behalf of OLHL.

143. Accordingly, there exist binding obligations on OLHL (and its owners) to satisfy the Capitalisation Requirement. The funding is to be obtained, as to a sum between £40 million and £70 million, by the issue of new preference shares. The boards of the relevant companies in the Utmost group have already approved the issue of shares and the making of this capital contribution down the chain of relevant companies. In addition, UUG Holdings (No.3) Limited, the intermediate holding company of Utmost, has entered into a £100 million facility with a syndicate of banks. Drawdown

on the facility is conditional upon the equity funding being provided and the Transfer being sanctioned. The precise amount of capital required depends upon the precise level of Utmost's SCR (since the obligation is to provide capital to satisfy an SCR Ratio of 150%). Accordingly, there is a time period measured in days, once the Transfer is sanctioned, before the drawdown can occur.

144. It follows from the above that there is a practical necessity that sanction of the court is obtained notwithstanding that the Scheme and Transfer remain conditional on satisfaction of the Capitalisation Requirement.

145. The circumstances in which the court is prepared to sanction a scheme of arrangement or transfer scheme notwithstanding its implementation remains conditional on further events, were considered by Henderson J in *Re Lombard Medical Technologies Plc* [2014] EWHC 2457 (Ch). He concluded, at [24] as follows:

> "I can see no reason in principle, however, why the court may not, in an appropriate case, sanction a scheme when there is an outstanding condition which still needs to be satisfied, and direct that the order should not be sealed (or, as in the present case, that the order should not be delivered to the Registrar) until the condition has been satisfied."

146. He further concluded that it was not always necessary that all conditions were satisfied before the order was sealed. He noted (at [26]), as examples of matters which could remain unsatisfied at the time of sanction of the scheme, outstanding requirements for approval from foreign regulators. He went on:

> "By contrast, the court would be most unlikely to sanction a scheme if the outstanding condition was one which in effect conferred on a third party the right to decide whether, or when, the scheme should come into operation, or which enabled the terms of the scheme to be varied in some material respect. The objection then would be that the court was not truly in a position to consider the merits of the scheme, so it could not properly exercise the jurisdiction conferred on it by Parliament to approve the scheme on behalf of all members of the relevant class or classes of shareholders."

147. He referred, in this connection, to a decision of Santow J in the Supreme Court of New South Wales in *Re NRMA Insurance Limited* [2000] NSWSC 82, 33 ACSR 595. In that case, the judge expressed initial concern at the fact that sanction was sought to schemes of arrangement when conditions subsequent remained outstanding. He noted that failure to comply with these conditions would lead to the restoration of the *status quo*. This was to be contrasted with a scheme that contained machinery which could lead to variation of its terms. At [29] Santow J said:

> "Clarity and certainty are thus the touchstones. Provided that clarity and certainty are present on the face of the scheme and no new decision making process intrudes after court approval, it does not matter that different results may emerge in different (but clearly identified) eventualities. A key question is whether

> the scheme is, according to its own terms, self-executing in the sense that certain results follow in certain defined events."

148. At [29] of his judgment, Henderson J concluded that:

> "By parity of reasoning, it seems to me that a condition precedent which prevents the scheme coming into operation unless it is satisfied may also be acceptable, although every case must of course be considered on its own merits."

149. Henderson J was directed to the decision of Hildyard J in *Re Fibreweb plc* [2013] EWHC 4653 (Ch), in which it was suggested that there was a settled practice of the court, in the case of a takeover scheme, that the acquirer confirmed its waiver of satisfaction of conditions precedent, absent some particular circumstance, such as where the approval of some other court or regulator is required, before the court sanctioned the scheme. Henderson J concluded, however, that there was nothing in the *Fibreweb* case which would cause him to refuse to sanction the scheme in the case before him. He explained his reasons, at [42], as follows:

> "In the first place, the question arises in a very different commercial context from that which Hildyard J had to consider. Secondly, the general rule is anyway one which admits of exceptions where they can be explained and justified to the court. Thirdly, the solution adopted in the present case finds some indirect support in previous authority and practice, and seems to me to fall well within the proper scope of the unfettered discretion conferred on the court by section 899(1). For the avoidance of doubt, I do not wish to question the general practice of the court, as explained by Hildyard J, in the kind of case with which he was concerned. But I would respectfully emphasise that it is no more than a general rule of practice, which should not be uncritically applied in the context of other types of scheme, and may in any event be departed from for good reason."

150. The Scheme and Transfer in this case are more closely aligned with the type of case under consideration in *Fibreweb*, than that in *Lombard Medical*. Nevertheless, I am satisfied that it is appropriate to sanction the Scheme notwithstanding the Capitalisation Requirement has yet to be satisfied, for the following reasons. First, it is a practical necessity (as a result of the lenders imposing a condition, that the Scheme and Transfer be sanctioned, on the drawdown of the funding required to make a substantial part of the capital contribution) that the sanction of the court must predate the satisfaction of the Capitalisation Requirement. Second, this is a case which (in the words of Santow J) is self-executing, in the sense that certain results follow from certain defined events. Third, although the condition is substantively different from the approval of a foreign court or regulator, in light of the evidence I have seen it is highly unlikely that it will not be complied with. Fourth, this is not a case where the ultimate effectiveness of the Scheme and Transfer is dependent on the decision of a third party. On the contrary, the relevant third parties (being Utmost's parent company and its ultimate owners) are contractually bound, under arrangements that that can be enforced by Equitable, to satisfy the Capitalisation Requirement.

Fifth, the PRA has obtained undertakings from two of the companies in the Utmost Group (UUG Holdings (No.1) Ltd, which is the immediate subsidiary of UUG Holdings (No.3) Ltd, and Utmost Life and Pensions Holdings Ltd, which is the intermediate holding company between UUG Holdings (No.1) Ltd and Utmost, to the effect that the relevant funds will be applied towards satisfaction of the Capitalisation Requirement.

Conclusions on sanction of the Scheme and the Transfer

151. I return to the central questions in relation to the application for sanction of the Scheme and the Transfer.

152. I have already concluded that I am satisfied as to each of the four matters (referred to in *TDG*) raised for consideration on the application to sanction the Scheme, subject to any matters arising from a consideration of points made by objecting policyholders. Having considered those objections, I remain of the opinion that the Scheme is one which an intelligent and honest person, a member of the class concerned and acting in their own interest, might reasonably approve.

153. In addition, having considered the objections raised in relation to the Transfer, and having the benefit of detailed and comprehensive reports of the Transfer Independent Expert, the Policyholders Independent Expert, the PRA and the FCA, I am satisfied that the statutory requirements are met and that in all the circumstances it is a transfer scheme that I should exercise my discretion to sanction.

154. Accordingly, I will sanction the Scheme and the Transfer.

155. Although I have not been persuaded to refuse to sanction the Scheme or Transfer on the basis of the objections raised by policyholders who attended in person or made submissions in writing, I wish to pay tribute to the clarity and economy with which each of them made their submissions. I am also grateful for the clarity and comprehensive assistance provided by all counsel, and those instructing them, in the preparation and presentation of this complex matter.