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Case No: FS-2017-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
FINANCIAL SERVICES AND REGULATORY LIST

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

Date: 09/03/2018

Before:

Sir Geoffrey Vos, Chancellor of the High Court

IN THE MATTER OF BARCLAYS BANK PLC
AND WOOLWICH PLAN MANAGERS LIMITED
AND THE FINANCIAL SERVICES AND MARKETS ACT 2000

- -

Mr Martin Moore QC and Mr Ben Shaw (instructed by Slaughter and May) appeared for the Applicants

Mr Rory Phillips QC and Mr Robert Purves (instructed by the PRA and the FCA) appeared for the Prudential Regulation Authority and the Financial Conduct Authority

Mr Javan Herberg QC and Mr Simon Pritchard (instructed by Grant Thornton) appeared for Mr Byers, the skilled person

Mr Michael Tennet QC and Mr Joseph Steadman (instructed by Linklaters) for Barclays Pension Fund Trustee Limited

Mr Robert Brown, a person who had made a statement of representations, appeared in person

Hearing dates: 27th and 28th February 2018

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Approved Judgment

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. Barclays Bank plc ("BBPLC") and Woolwich Plan Managers Limited ("WPML") (together the "Applicants") are members of the Barclays banking group (the "Group"). They are the first of the 5 major UK banks to seek final sanction of their proposed ring-fencing transfer scheme (the "Scheme") under Part VII of the Financial Services and Markets Act 2000 ("FSMA"). There have been several judgments in the lead up to this sanction hearing, but it is now necessary for the court to consider as a matter of its discretion whether to sanction the Scheme under section 111 of FSMA.

2. I have had the benefit of detailed written and oral submissions on behalf of the Applicants themselves, Mr Mark Byers of Grant Thornton (the "Skilled Person" or "Mr Byers"), the skilled person appointed to provide the court with his report (the "Scheme Report"), the Prudential Regulation Authority ("PRA") and the Financial Conduct Authority ("FCA") (together the "Regulators"), and from Barclays Pension Fund Trustees Limited (the "Trustee"), the trustee of the Barclays Bank UK Retirement Fund ("UKRF"). There have also been some 100 statements of representations received, of which 97 related to the UKRF (the "pensions representations").

3. Since this is the first application for the court's sanction of a ring-fencing transfer scheme, I shall need in due course to consider the legal principles upon which the court should act in exercising its discretion to do so. I shall also need to consider the answers to the twofold "statutory question" which the Skilled Person is required to answer under section 109A(4) of FSMA namely (1) whether persons other than the transferor concerned are likely to be adversely affected by the scheme, and (2) if so, whether the adverse effect is likely to be greater than is reasonably necessary in order to achieve whichever of the purposes mentioned in section 106B(3) of FSMA is relevant.

4. BBPLC is a subsidiary of Barclays plc ("BPLC"), the ultimate parent of the Group. BBPLC is at the moment the Group's main trading entity, undertaking retail and investment banking activities in the UK and internationally. WPML, a subsidiary of BBPLC, acts as ISA (individual savings account) plan manager for funds offered as investments to BBPLC's private banking customers. In the broadest of outline, the Scheme proposed will transfer the bulk of BBPLC's UK retail and business banking business to a new ring-fenced entity, Barclays Bank UK PLC ("BBUKPLC"), a newly incorporated entity which is currently a subsidiary of BBPLC.

5. In a little more detail, the Scheme will transfer out of BBPLC those of its activities required to be inside the ring-fence, and some of its other activities that are permitted to be inside the ring-fence. Thus, BBPLC's UK retail banking operations and parts of its UK business banking operations (including deposit-taking, mortgage lending, payment cards, digital payment solutions and personal loans), as well as the UK wealth management businesses of BBPLC and WPML, will be transferred. These activities have operated under a dedicated division of BBPLC, Barclays UK ("BUK"), since 1st March 2016. The retail and business banking activities will be transferred into BBUKPLC. The wealth management activities will be transferred into Barclays Investment Services Limited ("BISL"), a subsidiary of BBUKPLC which will offer

agency dealing and other investment services. Then, on 1st April 2018 (the "Effective Date"), BBUKPLC's entire issued share capital will be transferred from BBPLC to BPLC.

6. The directors of the Applicants considered the approach I have briefly described as preferable to transferring out of BBPLC the businesses that needed to be outside the ring-fence, and making BBPLC the ring-fenced entity. This was at least partly because of the size and complexity of BBPLC's international and investment banking business, which needed to be outside the ring-fence.

7. It is perhaps important to note at this early stage that the Applicants have decided to limit those entitled to open accounts with BBUKPLC to those with an address in the European Economic Area ("EEA"). Customers based outside the EEA will, however, still be able to open accounts with BBPLC.

8. Two other Group companies will also form part of the Scheme. Barclays Services Limited ("ServCo") and its subsidiaries will provide the Group's operational entities (including BBUKPLC and BBPLC) with the services required for continuity. Various preparatory steps have already been taken, so that, for example, employees, assets and intellectual property rights have already been transferred to ServCo. There are, however, residual assets still to be transferred, which are the subject of one of the ancillary orders sought by the Applicants. Barclays Security Trustee Limited (the "Security Trustee") will hold security interests provided by certain of BBUKPLC's and BBPLC's corporate and business banking customers on trust from the Effective Date.

9. As I will explain in more detail below, the pensions representations primarily complain about BBPLC becoming the UKRF's principal employer by 1st January 2026. They would generally prefer BBUKPLC to become the UKRF's sponsoring employer, or would advocate the UKRF being split into two schemes, one sponsored by each of BBPLC and BBUKPLC. It is said that BBPLC is a smaller and riskier entity than BBUKPLC. The remaining representations concern (1) the position of retail banking customers in Jersey and other Crown Dependencies (made by a Mr Robert Brown ("Mr Brown"), who made oral submissions), (2) the effect of the Scheme on ISA investment accounts and the protection afforded by the Financial Services Compensation Scheme ("FSCS") (made by a Mr Bruce Garbutt ("Mr Garbutt")), and (3) the continuity of a right to legal redress against BBPLC (made by a Ms Rachel Mawhood ("Ms Mawhood")). I will return to the detail of these representations in due course.

The ring-fencing regime

10. The ring-fencing legislation was enacted in response to the 2008-2009 financial crisis, with a view to strengthening UK banks and providing additional protection to their retail and small business customers.

11. A new Part 9B of FSMA was introduced by section 4(1) of the Financial Services (Banking Reform) Act 2013 ("FSBRA"). Part 9B will take effect from 1st January 2019. It requires UK financial institutions to separate and ring-fence "core activities" from "excluded activities" (sections 142A and 142G of FSMA). The only activity so far designated as a core activity is accepting deposits (section 142B of FSMA). The

Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014 (the "CAO") defines this activity as accepting a "core deposit". Paragraph 2 of CAO explains the circumstances in which accepting a deposit is not a core activity. The definition is framed negatively but has the effect that a core deposit is one taken from a retail or small business customer at a branch of a UK bank that is subject to Part 9B of FSMA in the UK or elsewhere in the EEA. The CAO further provides that the ring-fencing regime only applies to an institution if its combined value of core deposits exceeds £25 billion (paragraph 12). "Excluded activities" include dealing in investments as principal (section 142D of FSMA) and other activities specified in the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014 (the "EAPO"). Paragraph 20 of the EAPO provides that a ring-fenced body must not (subject to certain exemptions) maintain or establish a branch in, or have any subsidiary incorporated in or formed under the law of, a non-EEA country. Leading counsel for the Applicants informed me that Her Majesty's Treasury ("HMT") is aware that an amendment to this provision will be required before the UK leaves the European Union, because it would otherwise thereafter preclude UK branches or subsidiaries.

12. These legislative provisions have led 5 of the UK's banks – Barclays, HSBC, Lloyds, RBS and Santander – to apply for sanction of ring-fenced transfer schemes in advance of 1st January 2019. The court in Scotland is dealing with RBS's sanction application, and this court is dealing with the remaining four banks' applications.

The legislation relating to ring-fencing transfer schemes

13. I shall now set out the relevant parts of the legislation that relates to the ring-fencing transfer schemes that will be required if the UK banks are to comply with the ring-fencing regime when it comes into force on 1st January 2019. These provisions were generally amended or inserted into Part VII of FSMA by section 6 and schedule 1 to FSBRA.

14. Section 106B of FSMA provides as follows:-

> "(1) A scheme is a ring-fencing transfer scheme if it— (a) is one under which the whole or part of the business carried on— (i) by a UK authorised person, or (ii) by a qualifying body—is to be transferred to another body (the transferee), (b) is to be made for one or more of the purposes mentioned in subsection 3, and (c) is not an excluded scheme or an insurance business transfer scheme …
>
> (3) The purposes are (a) enabling a UK authorised person to carry on core activities as a ring-fenced body in compliance with the ring-fencing provisions; (b) enabling the transferee to carry on core activities as a ringfenced body in compliance with the ring-fencing provisions; (c) making provision in connection with the implementation of proposals that would involve a body corporate whose group includes the body corporate to whose business the scheme relates becoming a ring-fenced body while one or more other members of its group are not ring-fenced bodies; (d) making provision in connection with the implementation of proposals that would involve a body corporate whose group includes the transferee becoming a ring-fenced

> body while one or more other members of the transferee's group are not ring-fenced bodies …
>
> (5) For the purposes of subsection 1(a) it is immaterial whether or not the business to be transferred is carried on in the United Kingdom.
>
> (6) 'UK authorised person' has the same meaning as in section 105 …
>
> (8) 'The ring-fencing provisions' means ring-fencing rules and the duty imposed as a result of section 142G".

15. Section 107 of FSMA provides as follows:-

> "(1) An application may be made to the court for an order sanctioning an insurance business transfer scheme or banking business transfer scheme, a reclaim fund business transfer schemes or a ring-fencing transfer scheme.
>
> (2) An application may be made by— (a) the transferor concerned (b) the transferee, or (c) both.
>
> (2A) An application relating to a ring-fencing transfer scheme may be made only with the consent of the PRA.
>
> (2B) In deciding whether to give consent the PRA must have regard to the scheme report prepared under section 109A in relation to the ring-fencing transfer scheme".

16. Section 109A of FSMA provides as follows:-

> "(1) An application under section 106B in respect of a ring-fencing transfer scheme must be accompanied by a report on the terms of the scheme ('a scheme report').
>
> (2) A scheme report may be made only by a person— (a) appearing to the PRA to have the skills necessary to enable the person to make a proper report, and (b) nominated or approved for the purpose by the PRA.
>
> (3) A scheme report must be made in a form approved by the PRA.
>
> (4) A scheme report must state— (a) whether persons other than the transferor concerned are likely to be adversely affected by the scheme, and (b) if so, whether the adverse effect is likely to be greater than is reasonably necessary in order to achieve whichever of the purposes mentioned in section 106B(3) is relevant.
>
> (5) The PRA must consult the FCA before— (a) nominating or approving a person under subsection 2(b), or (b) approving a form under subsection (3)".

17. In relation to ring-fencing transfer schemes, section 110 of FSMA provides that:-

> "(3) Subsections 4 and 5 apply when an application under section 107 relates to a ring-fencing transfer scheme.

> (4) The following are also entitled to be heard— (a) the PRA (b) where the transferee is an authorised person the FCA, and (c) any person ('P') (including an employee of the transferor concerned or of the transferee) who alleges that P would be adversely affected by the carrying out of the scheme.
>
> (5) P is not entitled to be heard by virtue of subsection 4(c) unless before the hearing P has— (a) filed … with the court a written statement of the representations that P wishes the court to consider, and (b) served copies of the statement on the PRA and the transferor concerned".

18. Section 111 of FSMA provides as follows:-

> "(1) This section sets out the conditions which must be satisfied before the court may make an order under this section sanctioning an insurance business transfer scheme, a banking business transfer scheme or a reclaim fund business transfer scheme, or a ring-fencing transfer scheme.
>
> (2) The court must be satisfied that … (ab) in the case of a ring-fencing transfer scheme the appropriate certificates have been obtained (as to which see Parts 2B of [Schedule 12]); (b) 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 (or will have it before the scheme takes effect).
>
> (3) The court must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme."

19. Paragraph 9B of part 2B of schedule 12 of FSMA defines the "appropriate certificates" for the purposes of section 111(2)(ab) as follows:-

> "(1) For the purposes of section 111(2) the appropriate certificates, in relation to a ring-fencing transfer scheme, are—
>
> (a) a certificate given by the PRA certifying its approval of the application,
>
> (b) a certificate under paragraph 9C …".

20. Paragraph 9C of part 2B of schedule 12 of FSMA deals with the provision by a "relevant authority" of a certificate as to financial resources ("CFR") as follows:-

> "(1) A certificate under this paragraph is one given by the relevant authority and certifying that, taking the proposed transfer into account, the transferee possesses, or will possess before the scheme takes effect, adequate financial resources.
>
> (2) "Relevant authority" means—
>
> if the transferee is a PRA-authorised person with a Part 4A permission or with permission under Schedule 4, the PRA;
>
> if the transferee is an EEA firm falling within paragraph 5(a) or (b) of Schedule 3, its home state regulator;

> if the transferee does not fall within paragraph (a) or (b) but is subject to regulation in a country or territory outside the United Kingdom, the authority responsible for the supervision of the transferee's business in the place in which the transferee has its head office;
>
> in any other case, the FCA.
>
> In sub-paragraph (2), any reference to a transferee of a particular description includes a reference to a transferee who will be of that description if the proposed ring-fencing transfer scheme takes effect."

21. In relation to ancillary orders, section 112 of FSMA provides as follows:-

> "(1) If the court makes an order under section 111(1), it may by that or any subsequent order make such provision (if any) as it thinks fit—
>
> (a) for the transfer to the transferee of the whole or any part of the undertaking concerned and of any property or liabilities of the transferor concerned; …
>
> (d) with respect to such incidental, consequential and supplementary matters as are, in its opinion, necessary to secure that the scheme is fully and effectively carried out.
>
> (2) An order under subsection (1)(a) may—
>
> … (c) make provision as to future or contingent rights or liabilities of the transferor concerned, including provision as to the construction of instruments (including wills) under which such rights or liabilities may arise; …".

The Applicants' communications plan

22. Section 110 of FSMA provides that any person who alleges that they would be adversely affected by a scheme is entitled to be heard at the sanction hearing. The way in which the Applicants proposed to communicate the Scheme to stakeholders was therefore of critical importance. On 10th November 2017, I approved the Applicants' communications plan (having provisionally approved parts of it on 31st July 2017).

23. In summary, there was a general communications programme for all stakeholders including (a) a dedicated ring-fencing website (which made available key documents relating to the Scheme, and explained the court process and how to raise objections), (b) 'lead stories' on other high-volume Group websites, (c) posters in the Group's UK and offshore branches, (d) explanatory messages appearing for a series of two-week bursts on the key screens of Automatic Teller Machines ("ATMs"), (e) a series of advertisements in major UK newspapers, and (f) engagement with leading consumer groups and industry bodies.

24. The Applicants' communications plan also included individual notifications by letter, e-mail or Relationship Manager contact to all transferring customers and other stakeholder groups who it was thought might wish to allege that they would be adversely affected by the Scheme. There were certain exceptions, such as deceased customers and 'gone-aways' for whom the Applicants knew that they did not hold correct contact details.

25. The general communications programme went live on 4th September 2017, and some 29 million individual notifications were sent by 15th December 2017. As I said in my judgment of 1st February 2018 (*Re Barclays Bank and others* [2018] EWHC 168), the plan has been broadly carried out as directed, save for some minor departures which have been adequately explained. Notifications about the Scheme and about this final sanction hearing have been adequately communicated to the appropriate groups of people in a satisfactory way.

Procedural chronology

26. On 21st October 2016, having consulted with the FCA, the PRA consented to the Applicants' appointment of Mr Byers as the Skilled Person.

27. On 26th May 2017, Snowden J and I gave prospective guidance to Barclays, HSBC, Lloyds and Santander on their ring-fencing transfer schemes, in relation to (i) their proposed communications programmes and (ii) the timetable of hearings for their sanction applications (*Re Barclays Bank plc and others* [2017] EWHC 1482 (Ch)). I then made a specific order reflecting that guidance on 14th July 2017.

28. On 31st July 2017 in *Re Barclays Bank plc and others* [2017] EWHC 2234 (Ch), I provisionally approved key parts of the Applicants' communications programme including their proposed notifications to (i) customers transferring to BBUKPLC under the Scheme, (ii) potential future banking customers of the Group, and (iii) customers and stakeholders of Barclays US LLC and its subsidiaries.

29. On 3rd October 2017, the PRA approved the form of the Scheme Report as required by section 109A(3) of FSMA. On 23rd October 2017, Mr Byers issued the Scheme Report. On 31st October 2017, the PRA consented to the Applicants' sanction application as required by section 107(2A) of FSMA.

30. On 1st November 2017, the Applicants issued a Part 8 Claim under Part VII of FSMA seeking sanction of the Scheme. The Scheme Report accompanied that application as required by section 109A(1) of FSMA.

31. On 10th November 2017 in *Re Barclays Bank and others* [2017] EWHC 2894 (Ch), I approved (i) the Applicants' communications plan including those parts that I had provisionally approved at the 31st July 2017 hearing, (ii) communications with those customers likely to transfer into BBUKPLC, and to be unable after ring-fencing to use Barclays branches in Jersey, Guernsey and the Isle of Man, informing them of their loss of branch services, and (iii) the Applicants' guidance for objectors wishing to make representations at the sanction hearing.

32. On 1st February 2018 in *Re Barclays Bank and others* [2018] EWHC 168 (Ch), I gave directions at the case management conference for the conduct of the sanction hearing.

33. On 14th February 2018, Mr Byers issued a supplementary report on the Scheme (the "Supplementary Report"), which considered the statements of representation, amendments to the Scheme, and information on the financial position of the Group published since the Scheme Report.

34. On 15th February 2018, the FCA issued CFRs for BISL and the Security Trustee. The CFR for BBUKPLC was issued by the PRA (because BBUKPLC is a deposit-taker) on 19th February 2018. On the same day, the PRA issued its Certificate of Approval for the Applicants' sanction application. The Applicants have, therefore, obtained the certificates required by section 111(2)(ab) of FSMA.

Authorities and submissions on the court's discretion to sanction the Scheme

35. There are still two outstanding pre-conditions under section 111(2)(b) of FSMA to the sanction of the Scheme. These are the authorisations required, from the PRA in the case of BBUKPLC, and from the FCA in the case of BISL and the Security Trustee, "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". The Regulators have confirmed that these entities either have or will have these authorisations before the Effective Date.

36. I need, therefore, to decide under section 111(3) of FSMA whether "in all the circumstances of the case, it is appropriate to sanction the scheme". I shall deal first with the authorities that the parties have cited as being of some relevance to this question.

Relevant authorities

37. There has never before been an application to sanction a ring-fencing transfer scheme, but there have been many applications to sanction banking and insurance business transfer schemes under Part VII of FSMA. The parties have stressed the different context of the ring-fencing transfer applications, and I will deal with that context is due course. When considering the authorities on other Part VII transfers, however, one should bear that point firmly in mind.

38. Briggs J observed in *Re Pearl Assurance* [2006] EWHC 2291 (Ch) ("*Pearl*") that the court's discretion in a transfer of long-term insurance business was not a mere formality. He said this at paragraph 6:-

> "Notwithstanding that detailed perusal of a proposed scheme both by an independent expert and by the FSA are conditions precedent to the exercise of the court's discretion to sanction it, the discretion remains nonetheless one of real importance, not to be exercised in any sense by way of a rubber stamp".

39. The discretion in banking and insurance business transfer schemes under Part VII has hitherto been exercised as it was under the predecessor legislation in the Insurance Companies Act 1982. The most authoritative statement of this approach was set out by Hoffmann J in *Re London Life Association Ltd* (21st February 1989, unreported). His judgment has been repeatedly referred to and summarised. It is useful, I think, in this judgment to set out a longer than usual extract in Hoffmann J's own words at pages 5-7:-

"The need for court approval to a transfer of life insurance business dates back to the Life Assurance Companies Act 1870 … The Act of 1870 was passed in the aftermath of the spectacular failure in 1869 of the Albert Life Assurance Company, which had been highly acquisitive and taken over the businesses of more than twenty other societies. The main purpose of the Act of 1870 was to give regulatory powers to the Board of Trade, but section 14 provided that no life insurance company should amalgamate with another or transfer its business to another unless such amalgamation or transfer was confirmed by the court. Before such an application could be made, a statement of the nature of the arrangements and copies of the actuarial reports on which it was founded had to be sent to all policyholders. The court was given power, after hearing the directors and any "other persons whom it considers entitled to be heard", to confirm the arrangement if it was satisfied that "no sufficient objection to the arrangement" had been established. This power was however subject to a proviso that the arrangement should not be confirmed if it appeared that more than a tenth by value of the policyholders of the transferor company objected.

The Assurance Companies Act 1909 added a requirement that the material to be made available to the policyholders and the court should include the report of an independent actuary, but in all other respects the provisions of the 1870 Act remained substantially unchanged until the Insurance Companies Amendment Act 1973 replaced them with what are now sections 49 and 50 of the Insurance Companies Act 1982. For present purposes, the following changes are relevant. First, the veto exercisable by one-tenth or more of the transferor's policyholders disappeared. Secondly, the persons entitled to be heard on the petition (in addition to the applicant) were specified as the Secretary of State and –

> "any person (including any employee of the transferor company or the transferee company) who alleges that he would be adversely affected by the carrying out of the scheme"

Thirdly, the power of the court to sanction the scheme is no longer expressly conditional on it being satisfied that "no sufficient objection" has been established. It is expressed as a completely unfettered discretion. I doubt whether this change of language makes any difference except to make it clear that even in the absence of objection the court is not obliged to sanction a scheme.

Although the statutory discretion is unfettered, it must be exercised according to principles which give due recognition to the commercial judgment entrusted by the company's constitution to its board. The court in my judgment is concerned in the first place with whether a policyholder, employee or other person would be "adversely affected" by the scheme in the sense that it appears likely to leave him worse off than if there had been no scheme. It does not however follow that any scheme which leaves someone adversely affected must be rejected. For example, as we shall see, one scheme which might have adopted in this case would have adversely affected many of London Life's employees because they would have become redundant. But such a scheme might nevertheless have been confirmed by the court. 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. A board might have a choice of several possible schemes, none of which, taken as a whole, could be regarded as unfair. Some policyholders might prefer one such

> scheme and some might think they would be better off with another. But the choice is in my judgment a matter for the board. Of course one could imagine an extreme case in which the choice made by the board was so irrational that a court could only conclude that it had been actuated by some improper motive and had therefore abused its fiduciary powers. (*Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 835). In such a case a member would be entitled to restrain the board from proceeding. But that would be an exercise of the court's ordinary jurisdiction to restrain breaches of fiduciary duty; not an exercise of the statutory jurisdiction under section 49 of the Insurance Companies Act 1982.
>
> What is true of choices as between different schemes is also true of the details within a scheme. There are no doubt few schemes which could not in some respect be improved. But the terms of a scheme are a matter of negotiation between transferor and transferee companies and will, to a greater or lesser extent depending upon their respective bargaining strengths, involve concessions on both sides. Under the 1982 Act the court cannot, any more than under the Act of 1870, sanction the scheme subject to the making of amendments. (*Re Argus Life Assurance Company* (1888) 39 CHD 571, 580). It must be either confirmed or rejected, although no doubt the court in rejecting a scheme could indicate that it thought the vice lay in some particular term and that a fresh scheme without that term was likely to be acceptable. 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 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 only 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".

40. Since then, Evans-Lombe J derived 8 principles from Hoffmann J's judgment which he thought governed the approach of the court to applications for the sanction of transfers of long-term insurance business (see *Re Axa Equity & Law Life Assurance Society plc and Axa Sun Life plc* [2001] 1 All ER (Comm) 1010 at pages 1011-1012).

41. In *Re Royal Sun Alliance Insurance Plc* [2008] EWHC 3436 (Ch), David Richards J drew certain distinctions between the approach to be adopted in a scheme for the transfer of general, as opposed to long-term, insurance business. He emphasised that the court was concerned only with material adverse effects on the position of policyholders. In paragraph 11 of his judgment, he said that: "[i]t might be said that a transfer of business from a very large company to a large company involves a reduction in the cover available to the transferring policyholders, but assuming that the transferee is in a financially strong position it matters not that the level of cover in the transferee is less than that in the transferor. What the court is concerned to address

is the prospect of real, as opposed to fanciful, risks to the position of policyholders" (see Snowden J's reliance on this passage at paragraph 47ff in *Re HSBC Life (UK) Limited* [2015] EWHC 2664 (Ch)).

42. In *Re Alliance & Leicester plc* [2010] EWHC 2858 (Ch), Henderson J applied the principles that Hoffmann J had enunciated by analogy in relation to a Part VII scheme for the transfer of a banking business (see paragraphs 42-49).

The parties' submissions on the principles to be applied

43. Mr Martin Moore QC, leading counsel for the Applicants, submitted that a "ring-fencing transfer scheme is categorically different to any other species of Part VII transfer scheme" so that the approach set out in the above authorities must be adjusted. Ring-fencing is mandatory and has to be effected by 1st January 2019. It is a statutory project on an unprecedented scale and of undoubted national importance. Most importantly, the application for sanction must be accompanied under section 109A(1) of FSMA by a scheme report by a skilled person who is required to answer the statutory question in section 109A(4), namely (1) whether persons other than the transferor concerned are likely to be adversely affected by the scheme, and (2) if so, whether the adverse effect is likely to be greater than is reasonably necessary in order to achieve the purpose of the scheme.

44. Mr Moore emphasised that, in designing the Scheme, the directors of the Applicants had had to exercise a commercial judgment and to comply with their obligations under section 172(1) of the Companies Act 2006 to act in the way they consider "in good faith, would be most likely to promote the success of the company" having regard to a number of specified and other matters. It is worth mentioning the matters that are specified in that subsection, which are: (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.

45. Mr Moore also submitted that, in considering whether to sanction the Scheme, the court should pay close attention to the Skilled Person's answer to the statutory question, to the views of the Regulators, and to the commercial judgment of the Applicants' directors. It was not for the court to fashion the best possible scheme. As between different designs, none of which leaves people materially adversely affected, or no more so than is reasonably necessary to achieve the ring-fencing purposes, the choice is for the promoters of the Scheme to make.

46. Mr Rory Phillips QC, leading counsel for the Regulators, submitted as follows in his written skeleton argument:-

> "… it does not follow that the approach developed by the Court to the exercise of the discretion to sanction a banking or insurance business transfer will be of much assistance to the Court in deciding how to exercise the discretion to sanction [a ring-fencing transfer scheme]. That is because the compulsory nature of [a ring-fencing transfer scheme] and the protective purpose of the ring-fencing regime as a whole … are 'circumstances of the case' that (a) distinguish the decision to

> sanction [a ring-fencing transfer scheme] from the decision to sanction other transfers of business under FSMA 2000; and (b) should have significant weight in the Court's decision.
>
> For example, in [*Pearl*], the Court [endorsed] the proposition that 'ultimately what the court is concerned with is whether the scheme is fair as between different classes of affected persons'… that proposition should be approached with caution in relation to [a ring-fencing transfer scheme]: the Court could properly sanction [a ring-fencing transfer scheme] that disproportionately impacts one class of affected persons, if the Court is satisfied that the Skilled Person had properly concluded … that the impact is no greater than reasonably necessary to achieve the relevant ring-fencing purpose … The present case offers a concrete example. Customers of the Barclays UK Division in the Crown Dependencies will (if the Scheme is sanctioned) lose the benefit of local branch services. But the Skilled Person concludes … that this is no more than necessary to meet the requirements of the UK ring-fencing regime.
>
> … the Court should be reluctant to refuse to approve an otherwise credible and properly motivated [ring-fencing transfer scheme] unless there is a significant objection that the Applicants, the Skilled Person and the Regulators cannot address to the Court's satisfaction. Otherwise, the implementation of the ring-fencing regime, a statutory requirement of national importance … would or might be frustrated. That would be a very serious matter indeed, not least if the effect of the decision would be to put the Applicant bank at risk of breaching ring-fencing requirements".

47. I shall return to what I have determined to be the appropriate approach to the exercise of the court's discretion to sanction a ring-fencing transfer scheme, once I have dealt with the evidence that I have received concerning the answer to the statutory question and the statements of representation that have been made to the court.

<u>The evidence available to the court in relation to the answer to the statutory question</u>

The Applicants' views on the statutory question

48. Mr Tushar Morzaria ("Mr Morzaria") is the Group Finance Director and an Executive Director of both BPLC and BBPLC. In his first witness statement dated 31st October 2017, Mr Morzaria explained the Applicants' approach to, and conclusions on, the statutory question as follows:-

> "196. For the purposes of its own assessment of the Statutory Question, Barclays has considered the potential effects of: (i) the Ring-Fencing Transfers; and (ii) certain of the preparatory steps the Group has taken in anticipation of the [Effective Date] …
>
> 197. In order to undertake this assessment, Barclays has grouped guidance published by the PRA and FCA on ring-fencing transfer schemes into the following seven categories:
>
> (A) financial and business model sustainability;

(B) stakeholder experience in the run-up to and at the time of transfer;

(C) stakeholder experience in the post-structural reform state;

(D) stakeholder position in the creditor hierarchy;

(E) operational continuity;

(F) recovery and resolution planning; and

(G) governance and risk management,

(collectively, the "Assessment Criteria").

198. The Assessment Criteria were then applied to the following groups of stakeholders:

(A) customers of the Group, including [those that are transferring to BBUKPLC as part of the Scheme, and those that are not];

(B) employees and other persons engaged to work for various entities in the Group;

(C) trade unions and employee forums;

(D) third party suppliers to, and landlords in respect of leases held by, various entities in the Group;

(E) trustees of the Group's pension schemes (representing the interests of members);

(F) shareholders and debtholders (including bondholders) of BPLC and BBPLC …

(G) third parties that are provided with indirect access to payment systems;

(H) tax authorities;

(I) consumer groups;

(J) industry bodies;

(K) non-UK financial regulators;

(L) other entities in the Group;

(M) M&A counterparties …

(N) past and future customers and other stakeholders of the Group; and

> (O) the UK Government, associated governmental authorities, and the media,
>
> (collectively, the "Stakeholder Groups").
>
> 199. Further, where it was considered that stakeholders within a particular Stakeholder Group were likely to be affected … in different ways (for instance, due to their location, product set and/or ability to bear or mitigate an effect), Barclays further segmented the above Stakeholder Group(s) into more granular sub-groups. This approach ensured that the relevant effects were considered in relation to stakeholders displaying sufficiently similar characteristics.
>
> 200. This assessment focused on:
>
> > (A) the likely adverse effects … on each Stakeholder Group (or sub-group, if appropriate), primarily by assessing … the position these groups were in immediately prior to the implementation of these changes relative to the position immediately thereafter;
> >
> > (B) the net effect of the above after, and in light of, any mitigating actions undertaken or planned to reduce any identified adverse effect; and
> >
> > (C) the materiality of the net adverse effect, taking into account: (i) the likelihood of the impact adversely affecting the stakeholder; (ii) the size of the impact; (iii) a combination of (i) and (ii); and (iv) the stakeholder's ability to bear or mitigate the adverse effect …
>
> 202. Barclays has undertaken this assessment with a thorough, wide-ranging and rigorous analysis … Based on the findings … no material adverse effect is expected to stakeholders as a result of the implementation of these changes after, and in light of, any mitigating actions undertaken or planned to reduce any identified adverse effect. Therefore, Barclays has concluded that no group of stakeholders is likely to be adversely affected either by its preparatory steps or the Ring-Fencing Transfers …".

49. In his third witness statement dated 19th February 2018, Mr Morzaria provided the following update:-

> "14. … Barclays has been monitoring developments that might be relevant to its own assessment of the Statutory Question. None of the updates identified pursuant to this exercise have impacted Barclays' conclusion (as set out at paragraph 202 of the First Witness Statement) that no group of stakeholders is likely to be adversely affected by either Barclays' preparatory steps or the Ring-Fencing Transfers …".

50. The developments that Mr Morzaria was referring to included the criminal charge brought against BBPLC on 12th February 2018 by the Serious Fraud Office ("SFO"). BBPLC was charged with providing unlawful financial assistance to Qatar Holding LLC during a capital raising exercise in 2008, contrary to subsections 151(1) and (3)

of the Companies Act 1985 (the "Charge"). The FCA had issued Warning Notices to BPLC and BBPLC on 13th September 2013 in respect of the non-disclosure of related arrangements, and the SFO had already brought charges against BPLC on 20th June 2017.

51. Mr Morzaria said the following about the Charge in his third witness statement:-

> "11. … we have not seen any material financial impact on the Group since the [Charge] was brought. Our independent Risk Function has conducted rigorous stress testing analysis which has taken into account a wide range of potential outcomes and consequences arising from the charge as well as other changes in the environment Barclays operates in. While these tests cannot capture all potential outcomes arising from the [Charge] that could affect Barclays … the testing does support my conclusion … that it is appropriate for the Court to make the order to sanction the Ring-Fencing Transfers …".

Mr Byers's view on the statutory question

52. Mr Byers explains his approach to the statutory question at paragraphs 2.38-2.55 of the Scheme Report:-

> "2.38 The methodology used to address the Statutory Question and to prepare this report is hypothesis-led. I developed hypothetical assertions of ways in which persons could be adversely affected and assessed the likely impacts of the Scheme with the aim of proving or disproving the assertions. The assertions were categorised into groups, or "criteria", from which the risk of adverse effect to stakeholders could arise. These criteria build on my interpretation of the key regulatory and legislative documents published in relation to ring-fencing and in the broader principles and rules set out in the PRA Rulebook and FCA Handbook, including firms' regulatory duty to treat customers fairly. Following the approach set out in the PRA Policy Statement (PS10/16), the accompanying Statement of Policy and the FCA Final Guidance (FG16/1), I have also drawn from Barclays' Own Assessment of the Statutory Question (OASQ) …
>
> 2.48 Materiality is a key consideration to the assessment on Part (a) of the SQ. Materiality considers both the probability and magnitude of impact in determining whether an effect is material. I have considered materiality from the perspective of what is material to different categories of stakeholders, both in relation to the approach I have used to consider groups of persons who may be affected as well as to assess potential adverse effects.
>
> 2.49 My approach to considering persons who may be affected by the Scheme is to place individuals into groups which I consider have similar, or homogenous, characteristics. This is consistent with paragraph 5.6 of the PRA's Statement of Policy which states, "Given the size and complexity of the banks expected to make use of [ring-fencing], the Skilled Person may wish to consider the effects of the scheme on material groups of persons

where it would be impractical otherwise to assess the effects on all individual persons."

2.50 In relation to assessing adverse effects, I have been guided by the PRA's Statement of Policy, paragraph 5.10(ii), which states, "Given the breadth of the Statutory Question, the Skilled Person may wish to consider only material adverse effects." The materiality of residual risk of adverse effect has been considered from the perspective of the affected groups of persons or stakeholders, and hence quantitative or qualitative materiality thresholds may vary based on my consideration of what would reasonably affect relevant stakeholder groups and their ability to bear and mitigate any adverse effects.

2.51 Materiality concerns both the relevance and significance of the effect. I conclude that an effect is material where all of the following apply:

- the effect is a consequence of the Scheme
- it is distinguishable and of a magnitude greater than that of an inconvenience, query or matter that a person would bear in the normal course of their engagement with the Bank (eg for a supplier to the Bank, that it is greater than the ordinary cost of doing business with a regulated firm; or for an investor, that any costs or volatility caused by the Scheme are distinguishable from those caused by other factors)
- the affected person has limited opportunity to bear and manage and mitigate their adverse effect.

2.52 Expanding on the last point above, materiality needs to be considered in the context of the person being adversely affected. An effect is materially adverse if it is not bearable by the person affected. As an example, whether a consumer can bear the impact depends on their wealth and ease with which they can shop around and get a better deal. On that basis, the materiality threshold for a low-income customer is expected to be low. Conversely, high net worth individuals and large corporates are likely to have a higher propensity to bear adverse effects and to manage and mitigate such adverse effects by negotiating a better deal within or outside the Barclays Group.

2.53 I have applied careful judgement in determining whether an adverse effect is "likely" in considering the Statutory Question. I have also taken advice from Counsel on how this term might be interpreted by the Court. A literal definition of "likely" is an event which has in excess of a 50/50 probability of occurrence – [i.e.] more likely than not. However, in some circumstances "likely" can include events with a lesser probability. I consider that adopting the former of these definitions would create a hurdle too high in the context of applying a reasonable judgement. Therefore I have applied a lower hurdle so as to include events which are a realistic possibility. This is consistent with a recent legal judgement which referred to "likely" being "a possibility that cannot sensibly be ignored having

> regard to the nature and gravity of the feared harm in the particular case" [per Snowden J in *FCA v. Da Vinci* (2015) EWHC 2401 at paragraphs 257-258 referring to Lord Nicholls in *Re H* [1996] AC 563].
>
> 2.54 I have considered Part (b) of the [Statutory Question] only if a likely material adverse effect is identified in Part (a). This is consistent with paragraph 5.7 of the PRA's Statement of Policy, which states that "if the skilled person does not identify that any material groups of persons other than the transferor are likely to be adversely affected then the skilled person does not need to address Part (b) of the question in relation to these persons."
>
> 2.55 Where the likelihood of adverse effects is identified, I have considered whether it is reasonably necessary in order to achieve the ring-fencing purposes on two counts. Firstly, whether the Bank can reasonably be expected to implement further mitigating actions to reduce the residual risk of adverse effect; and secondly, whether I consider that other alternatives to the Scheme are available that have not been fully considered that would achieve the same ring-fencing objectives with materially fewer adverse effects. This is consistent with the PRA's Statement of Policy, which states that "the Skilled Person should consider whether there are alternative group arrangements that would still meet the purposes specified in s106 (B) but that would have materially fewer adverse effects." It also aligns with the FCA's Finalised Guidance 16/1, paragraph 1.24, which requires the Skilled Person "to properly consider viable alternatives to the proposal if they would materially reduce adverse effects on persons other than the transferor"."

53. In Part I of the Scheme Report, Mr Byers considered the risk profile of Group entities involved in the Scheme and asked whether stakeholders would be adversely affected as a result of becoming connected to a riskier entity than they are currently connected to. His analysis took into account, amongst other things, operational and governance continuity arrangements, and the capital, liquidity and funding positions of relevant entities. He concluded at paragraph P1.7 that:-

> "Overall, I have found no likely adverse effect in this part of the Report. From my analysis of each entity, I have concluded that the risk profiles of BPLC, BBPLC, BBUKPLC, ServCo and BISL will not materially deteriorate as a result of the [Scheme]. Consequently, the stakeholders associated with each of these entities are not likely to be adversely affected as a result of becoming connected to a riskier entity than they were connected to before the transfer."

54. In Part II of the Scheme Report, Mr Byers considered whether the Scheme was likely adversely to affect various stakeholder groups, including personal banking customers, Barclaycard customers, Wealth customers, corporate banking customers, investment banking customers, landlords, employees and contractors, suppliers, UKRF members, and others. He concluded that no stakeholder group was likely to experience an adverse effect, except that:-

> "10.165 Some Personal Banking customers may be affected by the limitations on using counter services in Offshore Islands branches. This limitation is driven by legislation and is a necessary consequence of ring-fencing. Barclays' analysis of BUK customers' use of Offshore Island branches is ongoing and will inform its mitigation and communication plans. Barclays' communications and engagement with customers will be critical to increasing awareness of the change and hence reducing the potential adverse effect, particularly for those customers likely to be more acutely affected …
>
> 10.168 Customers who use the counter services of BBPLC branches in Jersey, Guernsey and the Isle of Man and whose accounts transfer to BBUKPLC will no longer be able to use these services as a result of the Scheme. In my opinion, this is an adverse effect of the Scheme for this group of customers, but this is necessary in order for Barclays to satisfy the UK ring-fencing requirements."

55. In his Supplementary Report, Mr Byers stated that the conclusions he had expressed in the Scheme Report remained unchanged. I will return in due course to his observations on the various third-party representations made about the Scheme. In paragraph 3.7, he said that "the risks faced by BPLC, BBPLC, BBUKPLC, BISL and [ServCo] have not materially changed". In relation to other potential adverse effects, he said that:-

> "4.1 In paragraphs 10.154 – 10.168 of the [Scheme Report], I highlighted one area of adverse effect that would arise from the Scheme. Specifically, I noted that customers transferring to BBUKPLC visiting the Crown Dependency islands of Jersey, Guernsey and the Isle of Man (the Offshore Islands) will no longer have access to certain counter services (eg to deposit cash into their accounts) in BBPLC branches. This limitation in service will not affect customers whose accounts will remain in BBPLC, including those with accounts with BBPLC Offshore Island branches. I concluded that the impact on affected customers was not likely to be greater than is reasonably necessary to achieve the Scheme's ring-fencing purposes because ring-fencing legislation explicitly prohibits ring-fenced bodies (eg BBUKPLC) from having non-EEA branches or subsidiaries and because adequate communications were planned to customers that were likely to be affected to enable them to control and mitigate the impact.
>
> 4.2 In paragraph 10.165 of the Report I stated that "Barclays' communications and engagement with customers will be critical to increasing awareness of the change and hence reducing the potential adverse effect, particularly for those customers likely to be more acutely affected." Since the publication of the Report I have continued to monitor Barclays' communications on this matter, and confirm that my conclusion remains that customers are not likely to be adversely affected more than is reasonably necessary. This is because Barclays has undertaken a number of communications which I consider adequate to enable affected customers to control and mitigate potential adverse effects …".

56. Mr Byers explained at paragraph 3.6 of his Supplementary Report that he had not yet had time to consider the impact of the Charge. He did, however, deal with it in a witness statement dated 20th February 2018 as follows:-

> "8. In my Supplementary Report, I … was still considering the impact of the new SFO charge. I have now completed my analysis of this development and have concluded that I do not need to alter the conclusions of my Report and Supplementary Report, and hence do not need to issue a further report.
>
> 9. I should … emphasise that I have not sought to assess the likelihood of the conviction of BBPLC, which would be impracticable, as well as potentially inappropriate. I have proceeded on the assumption (without making any judgment, and noting that the Bank is defending all charges) that there is a realistic possibility of conviction of BBPLC."

57. Mr Byers has, therefore, concluded in response to the statutory question that no persons are likely to suffer an adverse effect from the Scheme that is greater than reasonably necessary to achieve the ring-fencing purposes.

The Regulators' views on the statutory question

58. The Regulators have also taken the view that no persons are likely to suffer an adverse effect from the Scheme that is greater than reasonably necessary to achieve the ring-fencing purposes. They do not object to the orders sought by the Applicants and, as I have said, have granted or will grant the required certificates and authorisations.

The pension representations

59. As I have already mentioned, 97 of the 100 statements of representations received relate to the UKRF. In order to understand them, some context is required.

Background to the UKRF

60. The UKRF has approximately 230,000 members. It has been closed to new employees accruing final salary benefits since 1997, and the bulk of its members are deferred members or pensioners. It still has about 26,000 current employees accruing benefits to be paid out in the form of a capital sum on retirement. BBPLC has been its principal sponsoring employer since the 1970s, and BBUKPLC has been a participating employer since 1st September 2017.

61. With effect from 1st January 2026, paragraph 2 of the Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015 (the "Pensions Regulations") will prohibit ring-fenced bodies from being an employer in respect of multi-employer pension schemes that include non-ring-fenced bodies. Accordingly, it will no longer be possible after that date for both BBPLC and BBUKPLC to be employers in respect of the UKRF. The Applicants propose that, by 1st January 2026, BBPLC, rather than BBUKPLC, will become the principal employer of the UKRF.

62. The Group entered into a series of agreements with the Trustee in July 2017 (together referred to as the "Pensions Agreement") relating to the UKRF's triennial actuarial valuation as at 30th September 2016 (the "2016 valuation") and in order to provide mitigation for the impact of the Scheme. The 2016 valuation showed that the UKRF had total liabilities (or "technical provisions") of £42.5 billion, and assets of £34.6 billion, leaving a technical deficit of £7.9 billion. That was an increase of £4.3 billion compared to the deficit on the previous valuation as at 30th September 2013.

63. Mr Peter Richard Goshawk ("Mr Goshawk"), a member-nominated trustee director of the UKRF, Chair of the Trustee board, prepared a statement dated 19th February 2018 which has explained in detail the financial situation of the UKRF and the reasons why the Trustee decided to enter into the Pensions Agreement. I cannot repeat all Mr Goshawk's reasoning in this judgment, but suffice it to say that I have found the contents of that statement compelling. He explained the package of mitigation measures that the Trustee had agreed. The Pensions Agreement amended the schedule of employer contributions with a view to the UKRF reaching self-sufficiency (i.e. a state where it is fully funded on a technical basis for at least a 6-month period ending on 30th September in any year) by 2025 or 2026 (depending on the assumptions applied), rather than the prior target of 2030. It also introduced three sources of additional support for the UKRF beyond BBPLC's covenant. First, BBUKPLC will participate in (and, in the event of BBPLC's insolvency, support as "last man standing") the UKRF up to its exit from the UKRF shortly before 1st January 2026. Secondly, BBPLC will provide collateral amounting to 100% of the technical provisions deficit (originally 88.5%, but the 100% later agreed will take effect from 26th March 2018), subject to a cap of £9 billion. This arrangement will continue beyond 1st January 2026, and will be restored in the event that the deficit is eliminated but subsequently re-emerges. Thirdly, the proceeds of any dividends from BBUKPLC will be used to meet any deficit contribution that BBPLC is unable to pay. This mechanism will also continue after 1st January 2026, but will cease upon the UKRF reaching self-sufficiency.

The pensions representations themselves

64. I shall attempt to group the pensions representations into the common themes that emerge from them, rather than deal with each one individually. I shall then summarise the submissions or conclusions reached in relation to them by one or more of the Applicants, the Trustee, Mr Byers and the Regulators. I shall only distinguish between these parties where necessary, since their views seem to be reasonably aligned on the points made by the pensions representations.

First pensions point: BBUKPLC should be the principal sponsoring employer

65. The statements of representations suggest that BBUKPLC should have been chosen as the UKRF's sponsoring employer from at least 2026 because (i) BBPLC is a smaller entity, (ii) BBPLC is a riskier entity, (iii) BBPLC is more open to acquisition by a foreign purchaser, and because (iv) it is morally right for BBUKPLC to be the sponsoring employer as the majority of members worked in the Group's UK retail business.

66. The suggestion that BBPLC would be smaller than BBUKPLC is said to be factually incorrect, on the basis that (according to pro forma historical figures) BBPLC will

have assets of about £900 billion compared to BBUKPLC's £200 billion. Moreover, BBPLC is expected to generate the majority of the Group's attributable profit and a larger amount of free capital.

67. On the question of the riskier nature of BBPLC, the Applicants relied on the Skilled Person's reports. In particular, the Skilled Person made various assessments of the comparative risk profiles of BBPLC and BBUKPLC. At paragraphs 4.54 and 5.100 of the Scheme Report, the Skilled Person concluded that before and after the Scheme "the risk profile of BBPLC is such that the probability of BBPLC failing to meet its obligations as they fall due is remote", and that "the likelihood of the failure of BBUKPLC is remote" (see also paragraphs 12.91-12.92 in relation to the comparative risk profiles).

68. In his Supplementary Report, Mr Byers deals both with the comparative risk profiles of BBPLC and BBUKPLC and with the mitigations offered by the Pensions Agreement as follows:-

> "6.128 In addition to the analysis of the impact of the Scheme on the credit proposition of BBPLC … I set out in paragraph 20.5 of the Report that *"I am satisfied that the package of measures, agreed with the UKRF Trustee, will provide reasonable mitigation to the UKRF and its members for the potential adverse effect arising from the [Scheme]."* In my view, the potential adverse effect of the Scheme arises from transfer of the BUK business to BBUKPLC, and this effect should be considered together with the effect that the arrangements agreed by Barclays and the UKRF Trustee on 5 July 2017 (the Pension Agreement) will have on the UKRF. In answering the Statutory Question, I have considered the effects of the Scheme and Pension Agreement together because the Pension Agreement includes provisions made to mitigate and safeguard the UKRF and its members in anticipation of the Scheme taking effect …
>
> 6.130 I consider that the support from BPLC, the continued participation of BBUKPLC in the UKRF until 2025 and BBPLC remaining the UKRF's Principal Employer, preserves the employer covenant strength for the UKRF immediately following the transfer under the Scheme of the BUK business to BBUKPLC.
>
> 6.131 I also note that BBPLC itself was and continues to be, a very large and diversified bank which had and continues to have a minimal risk of default. Moreover, there is additional support available to BBPLC's covenant strength in support of UKRF in the form of the MREL available at BPLC. Whilst MREL does not arise as a result of ring-fencing – it is a separate piece of legislation that brings it about – the presence of the MREL does offer increased protection to BBPLC creditors in the event of losses threatening the viability of BBPLC, including the UKRF. As noted to me by Barclays, this MREL provides an additional source of funds to support the UKRF in the unlikely event BBPLC requires bail-in to maintain its capital position and support losses. The amount of MREL available to BBPLC to effect recapitalisation will absorb losses of up to circa £50bn …

> 6.133 In my opinion, the package of measures [in the Pensions Agreement] mitigates the anticipated withdrawal of BBUKPLC as a participating employer of the UKRF by reducing the UKRF's reliance on both BBUKPLC's and BBPLC's covenant. This is because, at the time of and beyond BBUKPLC's anticipated withdrawal, a potential reduction in the UKRF's employer covenant should be counterbalanced by a much improved funded position and security in the form of collateral for the value of any Technical Provisions deficit (up to £9 billion) that still remains. I would also note that there are two additional triennial valuations due prior to the anticipated departure of BBUKPLC in 2025 and that Barclays and the Trustee will be required to monitor the position of the UKRF throughout, making any amendments to the plans they deem appropriate given the circumstances at the time. In addition, the PRA and the Pensions Regulator are also required to monitor the position of the UKRF and ensure it complies with the pensions regulations …
>
> 6.133 In forming my opinions, I am required to consider whether the UKRF will be adversely affected by the Scheme. While the previous deficit reduction program would have provided for more contributions in the years 2017 to 2020, the new plan provides for more contributions from 2021 onwards. The new agreement also provides for a schedule of contributions to close the £7.9 billion Technical Provisions Deficit at 30 September 2016. Finally, as set out above, the Pension Agreement makes provision for the UKRF to benefit from a substantial level of collateral that was not previously in place, and a priority claim on any dividend paid by BBUKPLC to BPLC. I have concluded that the Pension Agreement provides reasonable mitigation to the UKRF and therefore its members are not likely to be adversely affected by the Scheme …".

69. BBPLC was explained to be a highly diversified business, both geographically and operationally, with investment banking and markets activities accounting for less than 30% of income. The Applicants took issue with the characterisation of BBPLC in certain press articles as a "casino bank". Its credit ratings are expected to be the same before and after ring-fencing (with the exception of Moody's, which is expected to rate BBPLC slightly lower, but still at an investment grade). Although Moody's had put BBPLC on negative outlook from 30th October 2017, that was taken into account in the Supplementary Report (see paragraph 3.5), and a one-notch downgrade by Moody's would bring BBPLC's rating into line with its S&P and Fitch ratings. It was further submitted that, in the extremely unlikely event of BBPLC's insolvency, the UKRF's position in recovering the remaining debt due under section 75 of the Pensions Act 1995 would be better than on an insolvency of BBUKPLC, because the latter would have a higher level of deposits ranking ahead of such debt.

70. In relation to foreign purchasers, it was submitted that there was no evidence that BBPLC would be more likely to attract a foreign purchaser than BBUKPLC. Even if BBPLC were to be taken over, its liability to the UKRF would be unaffected and the collateral and other elements of the Pensions Agreement would remain in place.

71. Finally, in this regard, it was submitted that, whilst it is understandable for members to want their pension schemes to be sponsored by the entity which they feel bears the

closest resemblance to the one they worked for, it cannot in reality be said that either BBUKPLC or BBPLC is the morally right sponsoring employer. BBUKPLC did not even exist when the vast majority of the members of UKRF worked for the Group. In any event, the size and capital position of BBPLC meant that it was better placed than BBUKPLC to support the UKRF.

Second pensions point: the UKRF should have been split into two schemes

72. Some statements of representations suggested that the UKRF should have been split into two schemes, one backed by BBUKPLC and the other by BBPLC.

73. The main submission in response was that it was not practicable to split the UKRF into two such schemes in a rational way. The UKRF has no records of where its members previously worked within BBPLC, so as to enable members to be logically aligned to a BBPLC or BBUKPLC scheme depending on where their particular business unit would be situated after implementation of the Scheme. In any event, many members will have moved between business units during their careers. Further, such an allocation would be likely to result in the majority of members being allocated to a BBUKPLC scheme, so as to force BBUKPLC to bear a significantly greater burden than BBPLC, despite it being the smaller bank.

74. An alternative approach which split the UKRF arbitrarily by random allocation would be difficult to justify to members, and would lead to complaints of unfairness if it transpired, as was possible if not likely, that one scheme outperformed the other.

Third pensions point: the mitigation in the Pensions Agreement is inadequate

75. These objections primarily focused on the adequacy of the collateral provided by BBPLC, in the light of its alleged smaller size and higher risk and the size of the UKRF's technical provisions deficit.

76. The Applicants relied on the points set out above in relation to the first pensions point, and in particular on the extracts from the Supplemental Report already quoted. Moreover, it was pointed out that both BBPLC and BBUKPLC will continue as employers for the UKRF for as long as possible under the legislation (until shortly before 1st January 2026). The UKRF is currently outperforming the assumptions underlying the Pensions Agreement, with the result that its deficit stood at £4.8 billion at 30th September 2017, well below the £9 billion collateral cap. The UKRF's actuary now considers there to be a 75% chance of self-sufficiency by 2025. Even if that is not achieved, the collateral arrangement and dividend mechanism described above should ensure that the level of financial security provided to UKRF's members does not decline after BBUKPLC ceases to be a sponsoring employer. Finally, the Trustee relied on the fact that the Pensions Agreement materially augmented its power to deal with changes to BBPLC's covenant at each triennial valuation, of which there will be two prior to 1st January 2026.

Fourth pensions point: the Pensions Agreement allows BBPLC to reduce near term deficit reduction payments

77. The pensions representations complain that the recovery plan makes contributions "back-end loaded". Mr Goshawk explained that a higher total level of deficit recovery contributions was agreed over the length of the recovery plan, but that in order to assist BBPLC to meet the costs of ring-fencing and regulatory capital requirements, during the implementation phase of ring-fencing, annual deficit contributions from 2017 to 2020 would be reduced and those from 2021 to 2026 would be increased.

78. The Applicants argued that, since the total deficit reduction contributions for the period up to 2026 were significantly higher, self-sufficiency will be achieved earlier. In addition, UKRF members were not the only stakeholders to have been affected by the Group's need to strengthen its capital. By way of example, the Group's dividends to shareholders have been reduced.

Fifth pensions point: the Trustee failed to follow the guidance of The Pensions Regulator ("TPR") in negotiating the Pensions Agreement

79. Some of the pensions representations complain that, in order to comply with TPR's guidance, the Trustee should have considered the deficit recovery plan separately from the ring-fencing proposals, and that, had it done so, greater mitigation would have been put in place.

80. Mr Michael Tennet QC, leading counsel for the Trustee, submitted that the Trustee had complied with TPR guidance. It was entirely appropriate for the 2016 valuation and the ring-fencing proposal to be considered together. The Trustee fully understood the difference between, on the one hand, negotiating a normal funding package following a triennial valuation and, on the other, negotiating a comprehensive package to ensure that the security of members' benefits was preserved in the context of ring-fencing. As the UKRF's scheme actuary explained, the Technical Provisions assumptions agreed for the 2016 valuation basis could reasonably be regarded as more prudent than would have been the case had there been no ring-fencing proposal. The mitigation package took these proposals fully into account.

Sixth pensions point: Group should have applied to TPR for clearance

81. Mr Moore submitted in response to this point that the Applicants were not obliged to apply for clearance under Regulation 4 of the Pensions Regulations, since the Scheme was not "likely to be materially detrimental to" the UKRF. BBPLC may apply for clearance in future, and a memorandum of understanding was entered into as part of the Pensions Agreement prescribing that BBPLC must apply if: (i) BBUKPLC ceases to be a participating employer in the UKRF prior to the agreed date, unless the Trustee agrees that this is not necessary; or (ii) there is a reduction in value or

termination of the dividend mechanism arising from BBPLC or BBUKPLC ceasing to be a subsidiary of BPLC prior to self-sufficiency being achieved.

82. Mr Moore submitted that, in any event, TPR clearance is not for the protection of members of the relevant pension scheme; rather, it provides protection to the sponsoring employer in the form of an assurance that TPR will not use its powers under sections 38, 43 or 47 of the Pensions Act 2004 (its "Moral Hazard Powers"). The fact that clearance has not been applied for or obtained does not adversely impact UKRF members, because it means that TPR will be able to use its Moral Hazard Powers in future, including against BBUKPLC, in the event that the UKRF still suffers from a deficit after 2025.

Seventh pensions point: the Trustee was placed under inappropriate pressure by Barclays to conclude the negotiation of the Pensions Agreement

83. Mr Tennet's answer to this point was that there was no inappropriate pressure placed upon the Trustee. The Trustee's board is made up of experienced professionals, the majority of whom are either member-nominated or independent of the Group. The Trustee's board was supported throughout the negotiation process by highly regarded and independent professional advisers (including Linklaters, Deloitte, Willis Towers Watson and Ondra Partners). It was, therefore, strong enough to resist any such pressure.

Eighth pensions point: communications from Barclays and the Trustee were misleading and inadequate

84. Mr Moore and Mr Tennet submitted in response to this point that neither the Applicants' nor the Trustee's communications with members of the UKRF were misleading or inadequate. Mr Byers, whilst acknowledging that such communications fell outside his scope of work in compiling the Scheme Report, expressed the view at paragraph 6.141 of his Supplementary Report that they were not misleading.

Ninth pensions point: the Skilled Person lacked pensions expertise and independence

85. Mr Javan Herberg QC, leading counsel for Mr Byers, submitted on this point that Mr Byers had drawn not only on his own expertise, but also on the work of senior actuaries and pension experts in Grant Thornton in assessing the statutory question (see paragraph 6.136 of the Supplementary Report). In relation to independence, it was pointed out that Mr Byers is under a duty to the court, which overrides his obligations to those who engage or pay him, and he has confirmed in both his Scheme Report and Supplementary Report that he understands and has complied with that duty.

86. Mr Phillips submitted that the PRA, in consultation with the FCA, approved the appointment of Mr Byers as the Skilled Person on the basis of factors including his independence.

Overview of the pensions representations

87. It seems, therefore, that the Applicants, the Regulators, the Trustee and the Skilled Person are agreed that the Scheme is not likely to have an adverse effect on the UKRF or its members (see paragraph 108 of Mr Morzaria's third witness statement, paragraph 14 of annex 2 of Mr Phillips's skeleton argument, paragraph 6.114 of the Supplementary Report, and paragraph 52 of Mr Goshawk's statement). Mr Goshawk concludes in that paragraph that the Pensions Agreement "is a fair deal for members which meets our objectives".

The other statements of representations

Mr Brown's representations

88. Mr Brown is a personal banking customer of BBPLC who resides in Jersey. He attended the hearing and made oral submissions. His objection to the Scheme was that he will not be able to enjoy the protection of banking with a ring-fenced bank. He argued that BBPLC's derivatives and investment banking business means that its risk profile will be higher than BBUKPLC's, and in any event that its risk profile will be different, and that there must be some additional protection conferred by ring-fencing because that is the whole purpose of the regime.

89. Initially, it seemed that Mr Brown was arguing that, as a matter of the construction of paragraph 20 of the EAPO and paragraph 3 of the CAO, BBUKPLC could, because of its processes being operated within the UK, allow him to open an account even though he lived in Jersey. Ultimately, however, it became apparent that his complaint was more that the Applicants had taken a policy decision not to allow anyone without a UK residential address to open an account with BBUKPLC. Mr Brown could open an account with BBPLC at its branches in Jersey, but not with BBUKPLC. He will not, therefore, be able to transfer his existing account into BBUKPLC. Mr Brown acknowledged that the legislation prevented Barclays from opening BBUKPLC accounts from its branches in the Crown Dependencies, because these are outside the EEA and thus caught by paragraph 20 of the EAPO. He would, however, prefer to bank within the ring-fence, which the Scheme would prevent, because of the Applicants' policy decision.

90. Mr Moore submitted in response to Mr Brown's representations that BBPLC would be a large and diversified bank, and that it was not inherently riskier than BBUKPLC. It was wrong to assume, as Mr Brown had suggested, that the UK government would be more likely to bail out BBUKPLC than BBPLC, since the whole purpose of ring-fencing and the other associated reforms was to avoid taxpayers having to bear such a burden, as was clear from the Final Report of the Independent Commission on Banking, which led to the reforms. It was a legitimate choice for the directors of the Applicants to make to prevent those who were not resident in the UK from opening accounts with BBUKPLC. It was, Mr Moore submitted, not for the court to choose the "best scheme", when more than one possible scheme could attract satisfactory answers to the statutory question. Moreover, Mr Brown was asking the court to choose a structure which would result in a greater adverse effect than the one proposed, because if Jersey residents were permitted to bank with BBUKPLC, they would be unable to use counter services locally in Jersey, which was the only adverse effect that Mr Byers had actually identified as resulting from the Scheme.

Mr Garbutt's representations

91. Mr Garbutt's statement of representations complains that, if his ISA investment account is transferred from BBPLC to BISL as envisaged by the Scheme, he will be prejudiced by the application of the client money rules in the FCA's handbook to his uninvested cash balances. Specifically, BISL will be required to place client money in trust accounts with a diversified range of banks. Mr Garbutt will not know how much has been deposited with each bank so that, once his own deposits are added to his client money balance, the combined amount deposited at a particular bank or banks may exceed the £85,000 limit of the FSCS. In order to mitigate this problem, the Applicants plan to publish details of BISL's panel banks, so that those affected can transfer their own deposits to other banks or (if this is not possible) choose an alternative investment account provider. Where the latter option is taken, the Applicants have undertaken not to charge any exit fees. In his supplementary statement dated 23rd February 2018, Mr Garbutt argues that these measures are insufficient. He submits that customers should be able to identify the exact value of their client money balance with each panel bank, and that, for transfers to be truly economically frictionless, other factors must be taken into account, such as time spent transferring and learning to use a new dealing system.

92. The Applicants submit that the adverse effects identified by Mr Garbutt in his supplementary statement are no more than administrative inconveniences, and are therefore insufficient to pass the first limb of the statutory question. This is consistent with Mr Byers's conclusion at paragraph 6.151 of his Supplementary Report:-

> "In summary, having considered [Mr Garbutt's statement], my opinion remains that whilst clients may be subject to an element of administrative inconvenience, affected clients have available to them the means to manage and mitigate potential adverse effects related to levels of available FSCS protection relative to their other non-Barclays banking relationships".

Ms Mawhood's representations

93. Ms Mawhood raises the concern that the Scheme could affect her right to seek redress against BBPLC. BBPLC provided banking services to her mortgagee. She claims that she redeemed her mortgage in full by depositing the required repayments into the mortgagee's account with BBPLC, but that BBPLC dealt negligently with her repayments, so that the mortgagee failed to acknowledge her redemption and her home was repossessed. She has not yet started proceedings against BBPLC, and is concerned that the Scheme will prevent her doing so in future.

94. The Applicants contend that, even if Ms Mawhood's claims are valid, they are not claims relating to "Transferring Businesses" within clause 21 of the Scheme document and will, therefore, remain with BBPLC. Accordingly, even after the Effective Date, Ms Mawhood will be able to bring her claims against BBPLC. Paragraph 6.156 of the Skilled Person's Supplementary Report concludes that "[Ms Mawhood] will not be adversely affected by the Scheme in relation to the matters set out in [her statement]".

<u>The principles that should be applied to the sanction of a ring-fencing transfer scheme</u>

95. I have set out above the legislation, the authorities that relate to other kinds of Part VII schemes and the parties' submissions. It is now necessary to draw the threads together.

96. In considering how the court should exercise its discretion in relation to a ring-fencing transfer scheme, it is important to set the necessity for such schemes in context. The introduction of the requirement for ring-fencing was not the only bank regulatory reform that was introduced in response to the financial crisis of 2008. Mr Morzaria summarised these reforms as follows:-

> "(A) substantially increased 'going concern' capital and liquidity requirements with detailed rules improving the quality of capital issued and increasing the amount of liquid assets held;
>
> (B) new rules with respect to 'minimum requirements for own funds and eligible liabilities' ("MREL"), which require both BBUKPLC and BBPLC to issue an amount of equity and subordinated debt equal to circa 30 per cent. of risk weighted assets ("RWAs") in order to effect a recapitalisation via 'bail-in' of the relevant entity in a stress. It is worth noting that the total of the Group's MREL eligible instruments as at 30 September 2017 on a transitional basis, measured as a proportion of RWAs, was 27.2 per cent. representing a loss absorbing capacity of over three times the largest loss suffered by a UK bank during the 2007-10 financial crisis (by Northern Rock at 7 per cent. of RWAs);
>
> (C) broad resolution powers of the Bank of England that (coupled with stabilisation enacted through MREL conversion) enable it to take remedial action to the benefit of critical stakeholders (such as the UKRF);
>
> (D) operational continuity requirements, whereby banks are required to identify and ensure that critical services that support critical economic functions supporting the wider economy can continue operating during a stress; and
>
> (E) senior manager requirements, whereby senior individuals within banks are individually accountable to the PRA and FCA for the ongoing operation of the bank, including recovery and resolution planning for their respective entities. This regime includes a criminal offence punishable by up to seven years in prison if, broadly, a senior manager is found to be culpable for a bank failure".

The context to which I have referred was also addressed in a speech given on 29th September 2017 by Sir John Cunliffe, the Deputy Governor of the Bank of England for Financial Stability.

97. It is important, therefore, to consider also the Scheme against the background of the purpose of ring-fencing, which was described in the PRA's paper "the Ring-Fencing Regime for UK Banks" of 10th February 2017 as being "to isolate retail banking services from the risks of global wholesale and investment banking, to ensure the continuity of deposit taking services, to ensure greater resilience against future financial crises and to remove risks from banks to the public finances".

98. Other factors too are relevant to the approach the court should adopt. Unlike other Part VII schemes, ring-fencing transfer schemes are compulsory for banks like the Applicants. There is an imminent deadline for the implementation of an appropriate ring-fencing transfer scheme. The Applicants have expended huge resources in putting together a scheme designed to comply with the legislative framework introduced for the purposes I have mentioned.

99. It is noteworthy that Part VII of FSMA does not provide for the approach that the court should adopt to a negative answer to the statutory question. In these circumstances (though the matter was not argued before me), it seems to me that it would not be *incumbent* on the court to refuse to sanction a ring-fencing scheme even if it or the Skilled Person reached the view that a material adverse effect was likely to be greater than was reasonably necessary in order to achieve the statutory purposes.

100. It seems to me, therefore, taking into account the authorities and the submissions that I have mentioned, that in exercising its discretion, the court must keep in mind, in addition to the contextual and other matters I have already mentioned, the following main factors:-

i) The court's discretion is unfettered and genuine and is not to be exercised by way of a rubber stamp.

ii) The design of a ring-fencing transfer scheme is a matter for the board of the bank concerned. There may be many possible approaches to the design of a statutorily-compliant ring-fencing transfer scheme that will affect stakeholders differently. The choice is for the directors of the bank concerned, acting properly in accordance with their duty under section 172(1) of the Companies Act 2006 (which is to act in the way they consider, in good faith, would be most likely to promote the success of the company having regard to matters including those specified in that subsection).

iii) The adverse effects of a ring-fencing transfer scheme must be viewed through the lens of the statutory question, so that the court must consider, with the aid of the Skilled Person, first whether persons other than the transferor are likely to be adversely affected by the scheme, and, if so, whether the adverse effect is likely to be greater than is reasonably necessary in order to achieve the statutory purposes. In considering whether persons are likely to be adversely affected by the scheme, regard need only be had to those adverse effects that are (i) possibilities that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case, (ii) a consequence of the scheme, and (iii) material in the sense that there is the prospect of real or significant, as opposed to fanciful or insignificant, risk to the position of the stakeholder concerned.

iv) Even if the statutory question is answered negatively, it will not automatically follow that a proposed scheme will be rejected. The court's approach will depend on all the circumstances, including the balance between the chosen design of the scheme, the benefits that will be achieved by the scheme, and the nature of the adverse effects identified, all viewed through the lens of the approach inherent in the statutory question itself.

v) The court will give weight to the views expressed to it by the Skilled Person and by the Regulators, and will fairly evaluate the weight to be given to views expressed to it in statements of representations made by stakeholders.

Should the Scheme be sanctioned by the Court?

101. The parties in this case were understandably more than anxious to receive the court's answer to this critical question. Despite that anxiety, I decided to reserve this judgment in order to take sufficient time to consider carefully the submissions that had been made and the statements of representations that had been put forward by people alleging that they would be adversely affected. I fully understand the importance of the Scheme, as was emphasised by several counsel, but the court's sanction is a crucial part of the process that deserves, as I have said, careful consideration.

102. In considering whether to sanction the Scheme, I have particularly taken into account the favourable views of the Skilled Person and of the Regulators that I have sought briefly to summarise in the earlier parts of this judgment. Moreover, I have paid special regard to the Skilled Person's careful, even meticulous, answers to the statutory question. It seems to me that the independence and sheer hard work that he has devoted to his task is to be commended. He has been through every aspect of the proposed Scheme with a view to identifying the likely strength of the covenants of the various entities now and in the future. He has given consideration to every conceivable effect of the Scheme on stakeholders large and small.

103. Ultimately, after the necessary anxious consideration, the Skilled Person has concluded that the only adverse effect of the Scheme that required consideration after application of the materiality threshold I have mentioned was the fact that customers transferring to BBUKPLC visiting the Crown Dependency islands of Jersey, Guernsey and the Isle of Man would no longer have access to counter services in BBPLC branches in those locations. The Skilled Person noted that that limitation in service would not affect customers whose accounts would remain in BBPLC (which include Mr Brown and other residents of the Crown Dependencies), and concluded that the impact on affected customers was not likely to be greater than was reasonably necessary to achieve the Scheme's ring-fencing purposes. He reasoned that the ring-fencing legislation expressly prohibited ring-fenced bodies like BBUKPLC from having non-EEA branches or subsidiaries, so that the adverse effect he had identified was unavoidable, and that adequate communications had taken place so as to enable affected customers to mitigate or control the impact of the change. I entirely endorse this approach. As it seems to me, the adverse effect identified is an inevitable consequence of having a separate ring-fenced bank.

104. I turn now to a consideration of the statements of representations that have been placed before the court. I should note first that those who filed statements of representations should be assured that I have given their written materials full and careful consideration notwithstanding that they did not (save for Mr Brown) appear to make oral submissions.

Discussion of the pension representations

105. I shall not explain again the competing positions on the 9 pensions points advanced by the 96 separate statements of representations made by members of the UKRF. I have covered those points in detail above.

106. I should mention first, however, a point that gave me some cause for initial concern, and that was the question of the quality of the covenant of BBPLC as compared to that of BBUKPLC. It seemed to me at first sight that there might be some merit in the contention that BBPLC was a weaker covenant than the ring-fenced bank, since the whole purpose of ring-fencing was to reduce the risks of a bank's failure for the benefit of retail and small business customers and the taxpayer. I have, therefore, looked particularly closely at the Skilled Person's evaluation of the strength of BBPLC as compared to that of BBUKPLC. I will not repeat the summary given above of that evaluation. It is obvious, as it seems to me, that the insolvency and other risks affecting the viability of each of BBPLC and BBUKPLC in the future will be different as an inevitable result of their varying business profiles. It is not, however, for the court to compare those risks. The court must evaluate in the context of the statutory question whether, objectively viewed, the members of the UKRF are likely to be adversely affected by the Scheme proposed. It will be recalled that these members are currently protected by the covenant of BBPLC, which will continue to undertake all the businesses it has in the past undertaken, with the exception of those transferred to the ring-fenced bank, and they are also, until late 2025, protected by the covenant of BBUKPLC.

107. The Skilled Person has reached the clear conclusion that the package of measures agreed with the Trustee will provide reasonable mitigation to the UKRF and its members for any potential adverse effect arising from the Scheme. He has concluded that the Pensions Agreement provides reasonable mitigation to the UKRF and therefore its members are not likely to be adversely affected by the Scheme. He says that support from BPLC, the continued participation of BBUKPLC in the UKRF until late 2025 and BBPLC remaining its principal employer, preserves the employer covenant strength for the UKRF immediately following the transfer under the Scheme of the BUK business to BBUKPLC. Even more importantly, he concluded that BBPLC will continue to be a very large and diversified bank with a minimal risk of default. He pointed to the additional support available to BBPLC's covenant in the form of the MREL available at BPLC. This provides an additional source of funds to support the UKRF in the unlikely event that BBPLC requires bail-in to maintain its capital position and support losses. He noted that the amount of MREL available to BBPLC to effect recapitalisation would absorb losses of up to about £50 billion. Moreover, Mr Byers considers that the package of measures in the Pensions Agreement mitigates the anticipated withdrawal of BBUKPLC in late 2025 as a participating employer by reducing the UKRF's reliance on both BBUKPLC's and BBPLC's covenant, because "at the time of and beyond BBUKPLC's anticipated withdrawal, a potential reduction in the UKRF's employer covenant should be counterbalanced by a much improved funded position and security in the form of collateral for the value of any Technical Provisions deficit (up to £9 billion) that still remains".

108. In these circumstances, my initial concerns about the different risks affecting BBPLC and BBUKPLC have been completely assuaged. As it seems to me, there is a strong foundation to the Skilled Person's views of the strength of BBPLC's ongoing

covenant and the mitigating effects of the package of measures that the Trustee has agreed in order to protect the UKRF.

109. With that introduction, I can deal briefly with the 9 pensions points as follows:-

i) I do not think there is any proper basis to question the decision made by the Group and the Trustee that BBPLC should remain the UKRF's principal sponsoring employer. BBPLC will in fact be larger and more diversified than BBUKPLC. Though the risks it will face will be different, there is no basis, on the foundation of the Skilled Person's analysis, to think that BBPLC faces a material insolvency risk. The Skilled Person concluded that before and after the Scheme the risk profile of BBPLC is such that the probability of BBPLC failing to meet its obligations as they fall due is remote. If any comparison were required, he reached the same conclusion in relation to BBUKPLC. There is nothing in the suggestion that BBPLC might be taken over to the detriment of the members of UKRF. There is no morally right employer for the UKRF, and in any event most of the members did not really work during their employment exclusively for either entity.

ii) The submission that the UKRF should have been split into two schemes is, in my judgment, entirely unworkable. It would create many more problems than it would solve. It would be impossible to divide members appropriately without an entirely impracticable analysis of the careers of the 230,000 members.

iii) The contention that the mitigation in the Pensions Agreement is inadequate has, in my view, been comprehensively rebutted by the Skilled Person's report. It is not for the court to second-guess the Scheme chosen by the directors, or in this case, the package of mitigation measures agreed between the Trustee and the Group in the context of the Scheme. Of course, there could have been more or less mitigation, but the Trustee and the Group have agreed what the Skilled Person considers an appropriate solution.

iv) The fourth pensions point is an aspect of the previous one, since it suggests that the Pensions Agreement should not have reduced the near-term deficit reduction payments in exchange for greater payments later. This approach ignores both the need for a balance between the interests of all stakeholders, and also the fact that self-sufficiency for the UKRF will be achieved earlier than would otherwise have been the case.

v) The fifth pensions point is also an aspect of the third. It is said that greater mitigation would have been achieved if TPR's guidance had been followed and the deficit recovery plan had been considered separately from the ring-fencing proposals. In my judgment, there is nothing in this point, which ignores the fact that the Technical Provisions assumptions agreed for the 2016 valuation basis may reasonably be regarded as more prudent than would have been the case had there been no ring-fencing proposal, and the fact that it was inevitable and desirable that the complexities of that proposal and the deficit recovery should be considered in the round.

vi) The suggestion that the Group should have sought clearance from TPR is also an irrelevant point. Clearance is not, as the Applicants pointed out, for the benefit of members, and a failure to apply for it does not adversely affect members.

vii) I am clearly of the view, on the basis of Mr Goshawk's evidence, that there is no basis for the suggestion that the Trustee was placed under inappropriate pressure to conclude the Pensions Agreement.

viii) The contention that communications from Barclays and the Trustee were misleading and inadequate has been adequately rebutted by both the Trustee and the Skilled Person. I have no doubt that the communications were appropriate and satisfactory.

ix) Finally, the suggestion that Mr Byers lacked pensions expertise and independence was, I think, an unworthy one. He drew on appropriate assistance from senior actuaries and pension experts in his firm. I have no doubt that Mr Byers would not have opined about pensions matters without a proper foundation for his opinion. Mr Byers's independence was assured by his duty to the court, of which he was well aware, and with which he complied.

Conclusion on the pensions representations

110. For the reasons I have briefly explained, I agree with the Applicants, the Regulators, the Trustee and the Skilled Person that the Scheme is not likely to have an adverse effect on the UKRF or its members. I do not think that the pensions representations provide any basis for the court to refuse to sanction the Scheme.

Discussion of the 3 separate representations

111. As I have said, Mr Brown's main complaint was that he could not, as a Jersey resident without a UK address, transfer to the ring-fenced bank, BBUKPLC. I have already dealt with Mr Brown's suggestion that BBPLC is a riskier entity than BBUKPLC. As I have said, the Skilled Person concluded that the risk of failure of either BBPLC or BBUKPLC was remote. Mr Brown was also wrong to think that the likelihood of the UK government bailing out BBUKPLC was a relevant factor; ring-fencing was introduced to avoid the need for such bail-outs. Mr Brown's objection to being left to bank with BBPLC is an unavoidable consequence of the directors' decision to design the ring-fencing scheme as they have. As I have explained, it is not the function of the court to second-guess such design decisions. It is clear that the Scheme will not have a material adverse effect on Mr Brown or customers like him, as the Skilled Person has confirmed. Indeed, if he were able to bank with BBUKPLC, he would lose the benefit of local counter services in Jersey, so that on one analysis he is better off with the Scheme in its present form.

112. I have already explained Mr Garbutt's concern that the FCA's client money rules will mean that his uninvested cash balances will be placed in trust accounts with an unknown range of banks, so that his overall deposits with such banks may exceed the £85,000 limit of the FSCS. In my judgment, this adverse effect of the Scheme is not a material one. It has been adequately mitigated by Applicants' plan to publish details

of BISL's panel banks, to allow Mr Garbutt and others like him to transfer their own deposits to other banks or to choose an alternative investment account provider. The latter option, contrary to Mr Garbutt's submission, would be substantially economically frictionless. Any slight inconvenience caused is not sufficient to amount to a material adverse effect, as the Skilled Person concluded.

113. Ms Mawhood's concerns were, in my judgment, misplaced. It is clear that, if Ms Mawhood has a valid claim against BBPLC, she will be able to bring that claim against BBPLC after the Scheme has been put into effect, just as she would have been able to do before.

114. In my judgment, therefore, none of Mr Brown's, Mr Garbutt's or Ms Mawhood's representations provide any basis for the court to refuse to sanction the Scheme.

Conclusions on whether the Scheme should be sanctioned

115. In the circumstances that I have described in detail above, and applying the approach that I have identified in paragraphs 95 to 100 of this judgment, I have concluded that (a) the statutory pre-conditions for the sanction of the Scheme have been or will be satisfied, and (b) that it is appropriate, in all the circumstances of the case, for the court to sanction the Scheme proposed by the Applicants under section 111(3) of FSMA. I will deal with the detail of the appropriate order to be made at a hearing to be arranged after I have delivered this judgment.

Should any ancillary orders be made?

116. The Applicants seek a number of ancillary orders under section 112(1)(d) of FSMA. They are described by the Applicants as "consequential, incidental or supplementary to the transfers", and as including "making necessary changes to terms and conditions, splitting security and guarantees, [and] transferring assets, and liabilities to persons other than the transferees". Within this description, there are two main ancillary orders sought. The first is the transfer of BBUKPLC shares from BBPLC to BPLC, which is provided for in clause 27 of the Scheme. It is intended that, on the Effective Date, BBPLC will transfer, by way of distribution *in specie*, the entire issued share capital of BBUKPLC to BPLC. That transfer would effectively complete the ring-fencing exercise by making BBPLC and BBUKPLC sister entities under the control of BPLC.

117. The second main ancillary order sought is the transfer of certain residual assets and liabilities to ServCo, as provided for in clause 28 of the Scheme. They include third-party supplier contracts which support the operations of both BBPLC and BBUKPLC and other Group companies, and some leaseholds where BBPLC is the tenant in respect of premises it shares.

118. The court may make an order under section 112(2)(d) of FSMA (set out above) if it is "necessary to secure that the scheme is fully and effectively carried out". In relation to other types of Part VII schemes, the meaning of the word "necessary" has been considered. Knox J said in *Re Hill Samuel Life Assurance* (10th July 1995, unreported) in relation to an insurance business transfer scheme that ""necessary" was somewhere in the middle between "vital" on the one hand and "desirable" on the other", and that it seemed to him 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". See also Lindsay J at paragraphs 8-9 in *Re Norwich Union Linked Life Assurance Limited* [2004] EWHC 2802 (Ch), Henderson J at paragraph 32 in *Re Alliance & Leicester supra*, and Snowden J at paragraph 41 in *The Copenhagen Reinsurance Company (UK) Ltd* [2016] EWHC 944 (Ch). In my judgment, the *dicta* in these cases are as applicable to ring-fencing transfer schemes as they are to other Part VII schemes.

119. The Regulators are content that the proposed transfers to ServCo are "incidental, consequential and supplementary matters as are … necessary to secure that the scheme is fully and effectively carried out", and that the transfer of the BBUKPLC shares to BPLC is "incidental, consequential and supplementary" to the Scheme and "necessary to secure that the scheme is fully and effectively carried out".

120. As regards the other alterations to terms and conditions, these are said by the Applicants to be necessary and often approved in the context of insurance business transfers, whether under section 112(1)(d) or under sections 112(1)(a) and 112(2)(c), which provides expressly that an ancillary order under section 112(1)(a) may include provision as to the construction of written instruments.

121. In relation to the splitting or sharing of security and guarantees, those actions are also said to be clearly necessary. Again, similar orders are said to have been made in insurance business transfers in relation to insurance contracts and outwards reinsurance contracts, and the process could also be covered by sections 112(1)(a) and 112(2)(c).

122. In my judgment, each of the ancillary orders that the Applicants seek falls within the provisions of section 112 of FSMA. I have little doubt that they are "incidental, consequential and supplementary" matters that are "necessary to secure that the [Scheme] is fully and effectively carried out", within section 112(1)(d) of FSMA. It is not necessary to reach a final conclusion on whether they also fall within section 112(2)(c) of FSMA.

Conclusions

123. For the reasons I have given, I will sanction the Scheme and approve the ancillary orders sought. I will hear counsel, as I have said, as to the precise form of the order sought.