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Case No: CR-2018-003686

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

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

Date: 24/11/2021

Before:

MR JUSTICE TROWER

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IN THE MATTER OF THE PRUDENTIAL ASSURANCE COMPANY LIMITED
- and -
IN THE MATTER OF ROTHESAY LIFE PLC
-and-
IN THE MATTER OF
THE FINANCIAL SERVICES AND MARKETS ACT 2000

MARTIN MOORE QC instructed by **Allen & Overy LLP** for **The Prudential Assurance Company Limited** and by **Latham & Watkins LLP** for **Rothesay Life PLC**
TOM WEITZMAN QC for the **Prudential Regulation Authority**
THEODOR VAN SANTE for the **Financial Conduct Authority**
Mr Thomas Copsey, Mrs Kornelia Robertson, Mrs Penelope Howell, Dr Jay Ginn, Mr David Mitchell and Mr Anthony Kell, policyholders of The Prudential Assurance Company Limited appeared in person

Hearing dates: 8, 9 and 10 November 2021

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be 24th November 2021 at 12 noon.

MR JUSTICE TROWER:

Introduction

1. In these proceedings, The Prudential Assurance Company Ltd ("PAC") as transferor and Rothesay Life plc ("Rothesay") as transferee seek an order sanctioning an insurance business transfer scheme (the "Scheme") pursuant to Part VII of the Financial Services and Markets Act 2000 ("FSMA"). References to section numbers in this judgment are references to sections of FSMA. If the Scheme is sanctioned, some 348,000 non-profit annuity policies in payment, together with six deferred annuities, will be transferred by PAC to Rothesay.

2. The proceedings have a long history. The substantive application for sanction was first heard by Snowden J in June 2019. For the reasons he gave in a reserved judgment handed down on 16 August 2019 (*In Re The Prudential Assurance Company Limited and another* [2019] EWHC 2245 (Ch)), the application for sanction was refused. PAC and Rothesay appealed, and, on 2 December 2020, the Court of Appeal (Sir Geoffrey Vos C, David Richards LJ and Sir Nicholas Patten) allowed the appeal (*In Re The Prudential Assurance Company Limited and another* [2020] EWCA Civ 1626) and remitted the matter to the Chancery Division, so that the application for sanction could be reheard.

3. Not surprisingly, the evidence at the remitted hearing is not identical to the evidence adduced at the outset, not least because more than two years has passed since the hearing before Snowden J. In particular, the number of annuities proposed to be transferred has reduced and the evidence dealing with the respective financial positions of PAC and Rothesay is different. As Mr Moore QC for the applicants and Mr Weitzman QC for the Prudential Regulation Authority ("PRA") explained, the need for the court to be supplied with the most up to date information available was one of the reasons why the Court of Appeal remitted the matter for a further hearing rather than determining it on the evidence then available.

4. The corporate structures of the groups of which PAC and Rothesay form part have also changed. PAC is now a key subsidiary in a demerged UK and European business of which the ultimate parent is M&G Plc. It carries on business as the main insurer in the M&G group. There has also been a change in the ownership of Rothesay. At the time of the hearing before the Court of Appeal, its shares were held by the Blackstone Group, the Government of Singapore Investments Corporation ("GIC") and MassMutual Financial Group ("MM"). On 1 December 2020 Blackstone sold its stake, such that the shares are held as to 49% each by GIC and MM, with the balance of 2% held by an employee benefit trust.

5. However, the essential form of the Scheme is unchanged. It provides for a straightforward transfer of the annuities from PAC to Rothesay with no alterations to any of the policy terms apart from the identity of the person against whom each annuitant is entitled to exercise their rights. Under the terms of the Scheme what is called the Transferred Business is transferred to and vested in Rothesay with effect from the date on which the Scheme takes effect. In broad terms, the Transferred Business comprises what is described as the Transferred Policies together with the rights benefits and property of PAC arising in connection with the Transferred Policies and any liabilities of PAC under or in respect of the Transferred Policies.

6. The economic effect of the transfer of liabilities has already been largely achieved, anyway so far as the applicants (and particularly Rothesay) are concerned, by two agreements entered into between PAC and Rothesay on 14 March 2018. The first was a business transfer agreement (the "Business Transfer Agreement") and the second was a collateralised reinsurance agreement (the "Reinsurance Agreement"). The transferring policies represent around 90% of the business reinsured by Rothesay under the Reinsurance Agreement, as the agreements also covered additional retail and bulk annuity policies.

7. The effect of the Reinsurance Agreement was to transfer the main part of the economic risk and reward of the transferred business from PAC to Rothesay. When the agreements were signed, the assets backing the annuity policies were transferred by PAC to Rothesay as part of the premium for the reinsurance. However, the contractual obligations under the policies remained with PAC. The Business Transfer Agreement expressly contemplated that the parties would co-operate to achieve the actual transfer of that business through the Scheme.

The Applicable Legislation

8. Part VII of FSMA contains provisions for the control of a number of different types of business transfer scheme. The control restriction relevant for present purposes is contained in section 104, which provides that no insurance business transfer scheme is to have effect unless an order has been made under section 111(1). The question of whether a scheme is an insurance business transfer scheme is dealt with by section 105, which (for present purposes) requires the scheme to result in all or part of the business being carried on by a UK authorised person to be transferred to another person to be carried on in an EEA state or in the United Kingdom.

9. It follows that the Scheme can only have effect so as to transfer the relevant annuities to Rothesay if an order under section 111(1) is made. The question for the court is whether the conditions for making such an order are satisfied (section 111(2)) and, if so, whether the court considers that in all the circumstances of the case it is appropriate to do so (section 111(3)).

10. Part VII also makes provision for the identity of those who can make an application for an order sanctioning an insurance business transfer scheme (section 107), for the Treasury to impose prescribed requirements by regulations (section 108) and for any application to be accompanied by a report on the terms of the scheme (section 109). This report may be made only by a person appearing to the appropriate regulator (in this case the PRA) to have the skills necessary to enable them to make a proper report and he or she must be nominated or approved for the purpose by the PRA. The maker of the report is conventionally called the independent expert. Section 109(3) provides that the report must be made in a form approved by the PRA. There are also provisions for consultation between the PRA and the Financial Conduct Authority ("FCA") (together the "Regulators") before the PRA nominates or approves the independent expert and before it approves the form of their report.

11. Provision is made by section 110 for the right to participate in proceedings for the sanction of an insurance business transfer scheme. Those entitled to be heard include

the FCA and, in a case such as the present in which both PAC and Rothesay are PRA-authorised persons, the PRA. They also include by section 110 (1) "*any person (including an employee of the transferor concerned or of the transferee) who alleges that he would be adversely affected by the carrying out of the scheme*". In the present case, it is plain that this definition includes any policyholder or annuitant who alleges that he would be adversely affected by the carrying out of the Scheme, but there is some uncertainty as to how much further it goes. I will revert to this question a little later because, during the course of the hearing, I was required to decide whether the court should hear submissions from a person whose entitlement to be heard was in issue.

Technical aspects of the application

12. In this, as in many other cases, the most substantial issue for the court to consider is whether in all the circumstances of the case it is appropriate to sanction the Scheme (section 111(3)). I shall turn to that question shortly. However, the court must also be satisfied as to a number of more technical questions, without which the court will not have jurisdiction to grant the relief sought. I shall deal with these questions at this stage.

13. The first question is whether the Scheme is an insurance business transfer scheme in the first place. As the Court of Appeal recorded ([2020] EWCA Civ 1626 at para 32), there is no issue in the present case that the Scheme is a business transfer scheme within the meaning of Part VII. I am satisfied that this requirement continues to be met, although the answer to the question has been affected by the United Kingdom's exit from the EU, which occurred after the hearing before Snowden J. As a consequence of Brexit, amendments were made to section 105 where a scheme is a "transitional insurance business transfer scheme" within the meaning of para 1 of the Schedule to the Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (SI 2019/710 as amended by SI 2020/1301). In the present case, the Scheme is a transitional insurance business transfer scheme because the independent expert was approved by the PRA under section 109(2) before IP completion day.

14. The consequences are now twofold. The first is that the court can only make an order under section 111 to sanction the Scheme within the period of two years beginning with IP completion day (para 2 of the Schedule to SI 2019/710 as amended). The second is that section 105 is modified so that the Scheme (a) can apply to UK business not just business carried on in one or more member states and (b) may result in the business transferred being carried on from an establishment of the transferee not just in an EEA state but also in the United Kingdom (para 6 of the Schedule to SI 2019/710 as amended). Both of these matters are or will be satisfied in this case.

15. The next question is whether the conditions referred to in section 111(2) have been satisfied. The court must be satisfied that the appropriate certificates have been obtained (section 111(2)(a)) and that the transferee has the authorisation required to enable the business which is to be transferred to be carried on in the place to which it is to be transferred (section 111(2)(b)).

16. The PRA has confirmed that in its opinion the certificates required by section 111(2)(a) are a certificate as to margin of solvency to be given by the PRA in accordance with para 2(1)(a) of Part I of Schedule 12 to FSMA and a certificate as to consent (also to be

given by the PRA) in accordance with para 3A of Part I of Schedule 12 to FSMA. The PRA has expressed itself satisfied that no other certificates are required in relation to the Scheme. I accept that conclusion.

17. On 27 October 2021, the PRA gave the necessary certificate as to margin of solvency and certified that, on the basis of the information provided to it, Rothesay will (taking the proposed transfer into account) possess before the Scheme takes effect the necessary margin of solvency. This reconfirmed the original solvency certificate dated 29 May 2019 that had been before Snowden J at the June 2019 hearing. I am satisfied that the requirement to obtain a certificate as to margin of solvency has been complied with.

18. As to the paragraph 3A certificate of consent, PAC and Rothesay continue to rely on the certificate dated 5 June 2019 given by the PRA at the time of the hearing before Snowden J. Directions entitling it to do so had been given by Patten LJ for the hearing before the Court of Appeal and by Deputy ICC Judge Schaffer for the purposes of this hearing. I am satisfied that, because these proceedings are the same proceedings as those in respect of which the June 2019 paragraph 3A certificate was obtained, there has been compliance with the requirement to obtain a certificate as to consent.

19. As to the authorisation requirements of section 111(2)(b), the PRA has confirmed that Rothesay, a company incorporated in England and Wales, is authorised by the PRA with permission to effect and carry out contracts of long-term insurance business in the United Kingdom within the required classes set out in Part II of Schedule 1 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. I am satisfied that this means that the provisions of section 111(2)(b) have been complied with.

20. There is then the question of the requirements imposed on applicants by section 108. The court has no power to make an order sanctioning an insurance business transfer scheme if they are not complied with (section 108(2)). They are prescribed by the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625), as amended (the "Regulations"). They require the applicants to publish a notice stating that the application has been made in a number of identified newspapers. The notice must also be sent to every policyholder of the transferor and the transferee, although this requirement may be waived by the court (regulation 4(2)). It must also be sent to every reinsurer of the transferor whose contract of reinsurance is being transferred. That notice must be approved by the PRA and contain the address from which a copy of the independent expert's report can be obtained together with a statement setting out the terms of the scheme and containing a summary of the report.

21. Directions relating to compliance with the advertisement and notification requirements of the Regulations were given by ICC Judge Prentice prior to the hearing before Snowden J. He also made an order pursuant to regulation 4(2) waiving the requirement for notification to every PAC policyholder. After the matter had been remitted by the Court of Appeal for a rehearing, further directions were given by deputy ICC Judge Schaffer on 23 July 2021 when he also gave directions for the listing of the hearing before me. I am satisfied that, insofar as they relate to advertisement and notification, the requirements of the Regulations and the directions given by ICC Judge Prentice and deputy ICC Judge Schaffer, have all been complied with.

Discretion: the law

22. Until December 2020, there were a number of first instance decisions on how the jurisdiction under Part VII of FSMA ought to be exercised but there was no appellate authority laying down guidance on the right approach to the exercise by the court of its discretion under section 111(3). I shall refer to a very few of those first instance decisions during the course of this judgment, but it is no longer necessary for me to consider them in any detail. Those which are most often cited have now been reviewed at appellate level in the judgment of the Court of Appeal in the present case ([2020] EWCA Civ 1626).

23. As the Court of Appeal explained, the statutory language is deliberately broad and reflects the wide range of circumstances in which business transfer schemes may be proposed (at para 39). On one level this points to an unfettered discretion, but the Court of Appeal was at pains to stress (in a passage cited below) that, although the discretion is unfettered and genuine, the court must only take into account and give proper weight to matters that are legally relevant to the determination of an application to sanction a scheme seeking to transfer the particular business to which that scheme relates.

24. Having analysed the legislation and reviewed the previous authorities, the Court of Appeal explained the correct approach in the following passage from its judgment ([2020] EWCA Civ 1626 at paras 75 to 86). Because of its importance to a proper understanding of the task the court is now required to carry out, and because the judgment was delivered in the same proceedings as those with which the court is now concerned, it is appropriate for this general description of the correct approach to be set out in full:

> "*75. The judge hearing an application for the sanction of an insurance business transfer scheme under Part VII should first, we think, identify the nature of the business being transferred and the underlying circumstances giving rise to the scheme.*
>
> *76. As we have already indicated, different considerations affect different types of business. For example, the court considering the transfer of a book of annuities in payment will be primarily concerned with the interests of the transferring policyholders, whereas a transfer of with-profits business may raise directly the question of fairness between the policyholders remaining with the transferor, the transferring policyholders, and the companies themselves and their shareholders. Transfers of some types of business may engage the interests of employees or other stakeholders in the transferor or transferee companies.*
>
> *77. The circumstances giving rise to the scheme proposed will also affect the approach of the court. For example, many schemes will reflect commercial transactions between transferor and transferee companies for the benefit of those companies. Other schemes will be occasioned by external events (such as the departure of the UK from the European Union) or the financial or other commercial circumstances of the transferor. Some may take the form of a rescue of the business retained or transferred.*

78. The discretion of the court has frequently been said to be unfettered and genuine and not to be exercised by way of a rubber stamp. That is true but, as in the exercise of all discretions, the court must take into account and give proper weight to matters that ought to be considered, and ignore matters that ought not properly to be taken into account. The correct identification of which matters fall on which side of the line in particular transfer situations has caused some confusion in this, and perhaps other, cases.

…

80. In a case such as the present, the paramount concern of the court will be to assess whether the transfer will have any material adverse effect on the receipt by the annuitants of their annuities, and on whether the transfer may have any such effect on payments that are or may become due to the other annuitants, policyholders and creditors of the transferor and transferee companies. The court will also be concerned to assess whether there may be any material adverse effect on the service standards provided to the transferring annuitants or policyholders. Whether any other factors require consideration will depend on the circumstances of the case.

81. The first duty of the court is carefully to scrutinise the reports of the independent expert and the Regulators, and the evidence of any person required to be heard under section 110 including those that allege that they would be adversely affected by the carrying out of the scheme. The court must understand the opinions presented and is entitled to ask questions about them as necessary. It will do so, in particular, with a view to identifying any errors, omissions, or instances of inadequate or defective reasoning.

82. In the absence of such defects, however, the court will always, in exercising its discretion, accord full weight to the opinions of the independent expert and the Regulators. That does not mean that the court can never depart from the recommendations of the expert or the non-objections of the Regulators, but it does mean that full weight must be accorded to them, so that a court would not depart from such recommendations and non-objections without significant and appropriate reasons for doing so. This is particularly so in relation to the financial and actuarial assessments required as regards the security of financial benefits. Whilst the judges hearing Part VII applications have considerable experience of the actuarial and specialist issues reported on by both the expert and the Regulators, the court is not itself an expert and should not substitute its own expertise for that of the entities required or entitled by statute to proffer those opinions.

83. This approach to the exercise of the court's discretion applies to the crucial question of whether the proposed scheme will have any material adverse effect on policyholders, employees or other stakeholders. An adverse effect will only be material to the court's consideration if it is: (i) a possibility 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 as opposed to fanciful or insignificant, risk to the position of the stakeholder concerned. In some cases, it may also be relevant

for the court to consider whether there would be such material adverse effects in the event that the scheme was not sanctioned.

84. Even if the court finds that the proposed scheme will have a material adverse effect on some group or groups of policyholders, it may still sanction the scheme in the exercise of its discretion. For example, this might occur if the scheme is in the nature of a rescue of the business. If there are differential effects on the interests of different classes of person affected, the court will need to consider whether the proposed scheme as a whole is fair as between those interests. The court should adopt the same approach to the exercise of its discretion (described at [82] above) when making the more general comparison between the positions that would exist with or without the proposed scheme in respect of (a) the security of the policyholders' benefits, and (b) the standards of service and corporate governance that the policyholders can expect. In many cases, this comparison will entail the court's consideration of the contractual rights and reasonable expectations of policyholders, including the standards of service and governance that can be expected if the scheme is implemented.

86. Once the court has undertaken the evaluations we have mentioned, the court will decide whether or not to sanction the proposed scheme, if, under section 111(3) it is, in all the circumstances of the case, appropriate to do so. It cannot require the applicants to vary or alter the scheme, even though that may sometimes be the effect of the court expressing its concerns. The choices of both the scheme itself and its detailed terms are for the directors of the transferor and transferee concerned. The primary duty of those directors is, of course, to promote the success of their companies."

Decisions of Snowden J and the Court of Appeal

25. As the Court of Appeal explained ([2020] EWCA Civ 1626 at para 3), Snowden J refused sanction of the Scheme for two main reasons. The first was that, although PAC and Rothesay had equivalent Solvency Capital Requirement ("SCR") metrics, Rothesay did not have the same capital management policies or the backing of a large well-resourced group with a reputational imperative to support it over the lifetime of the annuity policies. The second was that, in the light of PAC's sales materials, age and reputation, it was reasonable for policyholders to have chosen PAC on the basis of an assumption that it would not seek to transfer their policies to a third-party provider.

26. On the appeal, PAC and Rothesay advanced a number of arguments as to why Snowden J was wrong to reach the conclusion he did. They were not successful on all grounds, but the Court of Appeal identified ([2020] EWCA Civ 1626 at para 71) three central issues for it to determine:

"*(i) Whether (a) the judge was wrong to conclude that there was a material disparity between the external support potentially available for each of PAC and Rothesay, and/or (b) he failed to accord adequate weight to the conclusions of the independent expert that the risk of PAC or Rothesay needing external support in the future was remote (the "security of benefits issue").*

(ii) Whether the judge failed to accord adequate weight to the Regulators' lack of objection to the Scheme and to the continuing future regulation of Rothesay (the "regulatory issue").

iii) Whether the judge accorded too much weight to the fact that the objecting policyholders chose PAC on the basis of its age, venerability and established reputation, and reasonably assumed that PAC would provide their annuity throughout its lengthy term (the "reputational issue")."

27. So far as the security of benefits issue was concerned, the Court of Appeal concluded that Snowden J had been wrong to find that there was a material disparity between the non-contractual external financial support potentially available for each of PAC and Rothesay. It said that, in any event, he ought not to have regarded any such disparity as a material factor ([2020] EWCA Civ 1626 at para 110). It also concluded that Snowden J did not accord adequate weight to two other factors. The first was the conclusion of the independent expert that the risk of PAC or Rothesay needing external support in the future was remote and the second (dealing with the regulatory issue) was the Regulators' lack of objection to the Scheme and the continuing future regulation of Rothesay (at para 110).

28. As to the reputational issue, the Court of Appeal held ([2020] EWCA Civ 1626 at para 119) that subjective factors, such as the basis on which policyholders chose PAC, are not relevant to be taken into account in the exercise of the court's discretion and that the judge was wrong to have accorded weight to them. More particularly, it held (at para 121) that the judge ought not to have accorded any weight to the facts that the objecting policyholders chose PAC on the basis of its age, venerability and established reputation nor to the fact that they reasonably assumed that PAC would provide their annuity throughout its lengthy term.

29. These conclusions meant that the Court of Appeal determined that Snowden J erred in the approach he adopted to the exercise of his discretion. Two of the factors he took into account should have been ignored by him altogether, while he failed to accord adequate weight to three others: (a) the conclusion of the independent expert that the risk of PAC or Rothesay needing external support in the future was remote, (b) the Regulators' lack of objection to the Scheme and (c) the continuing future regulation of Rothesay. It is now the court's task to reassess the application for sanction having regard to those conclusions.

<u>Context of the Scheme</u>

30. In undertaking that task, the court must first identify the nature of the business to be transferred. As to that there have been no changes since the hearings before Snowden J and the Court of Appeal. The essential elements of the business remain exactly the same: i.e., a book of non-profit annuities in payment. The court is therefore primarily concerned with the interests of the transferring policyholders and its paramount concern is to assess whether the transfer will have a material adverse effect on the receipt by the annuitants of their annuities. It must also be concerned to assess any material adverse effect on service standards ([2020] EWCA Civ 1626 at para 81). Whether any adverse

effect on the annuitants can be treated by the court as material is explained in para 83 of the Court of Appeal's judgment (see above).

31. The next question is the context of the Scheme, which remains a commercial transaction as between PAC and Rothesay. This is the same broad context as existed at the time of the original hearing, in the sense that the Scheme is not driven by extraneous considerations such as Brexit or a business rescue. It is simply part of a transaction by which PAC has decided in its own commercial interests to make a transfer of a book of annuity business and Rothesay has decided in its own commercial interests that it wishes to acquire that book. The applicants propose the Scheme in a context in which the economic effect has largely been achieved by the Reinsurance Agreement in the sense that Rothesay's liabilities are the same in value whether or not the Scheme proceeds. If it does, it is just the identity of the persons to whom it is directly liable that changes. What the Scheme will, however, achieve for PAC is the discharge of its liability to annuitants. That will benefit it in some part, notwithstanding its existing ability to rely on the Reinsurance Agreement.

32. It was said by some policyholders that there was, therefore, now no reason for the Scheme, because the real commercial effect had already been achieved. I think that is to misunderstand the nature of what the Court of Appeal called the crucial question. The statute regulates what applicants must show to obtain the court's sanction to a scheme and focuses on whether its sanction will cause any material adverse effect to any person. It does not require the court to determine that there is no other means by which substantially the same economic effect can be achieved and for that reason the application for sanction should be refused.

33. The court must also decide whether there are any other factors to be taken into account having regard to all the circumstances of the case. However, it is clear that those factors do not extend to subjective considerations of the type discussed by the Court of Appeal (at [2020] EWCA Civ at paras 112, 113, 119 and 120). On the central questions of whether the transfer will have a material adverse effect on the receipt by the annuitants of their annuities or on service standards, the court must give full weight to the views of the independent expert and the non-objection of the Regulators. They are the first two of what Mr Moore called the layers of protection put in place for policyholders by the Part VII process.

The Independent Expert and his opinion

34. The independent expert reporting on the terms of the Scheme in accordance with section 109 is Mr Nick Dumbreck, a fellow of the Institute and Faculty of Actuaries and a partner of Milliman LLP. Mr Dumbreck's original appointment was approved by the PRA in consultation with the FCA on 21 June 2018. Since the decision of the Court of Appeal, the PRA (again in consultation with the FCA) confirmed on 1 April 2021 that it did not object to Mr Dumbreck continuing to discharge the role of independent expert for the purposes of producing reports for this remitted hearing. In a recent report to the court, the PRA has confirmed that it remains of the view that Mr Dumbreck is a person who is independent and has the skills necessary to enable him to make a proper report for the purposes of section 109(2).

35. An appendix to Mr Dumbreck's report discloses that he has acted as the independent expert in a significant number of Part VII transfers, including a number of transfers of annuity businesses. I have no hesitation in concluding that he has sufficient expertise to carry out the task, and I did not understand that any objector said that this was not the case. I shall come back to his independence a little later in this judgment when considering the policyholder objections.

36. Mr Dumbreck has made two reports for this remitted hearing, the first of which is dated 13 July 2021 and the second of which (his supplementary report) is dated 21 October 2021. Mr Dumbreck also made two reports for the earlier stage of the proceedings before Snowden J: one dated 21 January 2019 and the second dated 17 May 2019. I was not asked to consider those earlier reports and have not done so. As Mr Dumbreck explained, his July 2021 report is intended to constitute a stand-alone document that describes and considers all relevant areas of the Scheme in full and does not rely on the 2019 reports to provide a complete picture. The PRA has confirmed in its report to the court dated 19 July 2021 and 29 October 2021 that it has approved the form of the July 2021 and October 2021 reports prepared by Mr Dumbreck.

37. The July 2021 report is a thorough and detailed document. It contains an analysis of the impact of the proposed transfer on transferring policies, PAC's non-transferring policies and Rothesay's existing policies. This approach reflects the fact that each of those three categories of policyholder is in principle capable of being materially adversely affected by an insurance business transfer scheme such as the Scheme. However, as Snowden J said in the judgment he handed down after the first hearing of the sanction application ([2019] EWHC 2245 (Ch) at para 43), and I agree, it is plain that the most significant of these are the holders of the transferring policies. This is also reflected in the fact that all but a tiny proportion of the objections to the Scheme come from existing PAC policyholders whose annuities are being transferred.

38. Mr Dumbreck considered the impact of the implementation of the Scheme on the security of benefits for the transferring policies and the reasonable expectations of the transferring policyholders. His conclusions on those questions are of obvious and central relevance to what the Court of Appeal described as "*the crucial question of whether the proposed scheme will have any material adverse effect on policyholders, employees or other stakeholders*". If the answer to that question is that implementation of the Scheme will have that effect, the court is likely to pause long before making an order sanctioning it, although, even then, the Court of Appeal made clear that a material adverse effect on some policyholders will not necessarily amount to a bar to sanction. That would I think be an improbable result, however, if the adverse effect were to impact all policyholders in the same way and there were to be no differential treatment in respect of which questions of fairness between interests might arise.

39. In the event, Mr Dumbreck said he was satisfied that the implementation of the Scheme will not have a material adverse impact on the security of benefits under the transferring policies. He also concluded that the transfer will not have a material adverse impact on reasonable benefit expectations of transferring policyholders, nor would it have a material adverse effect on the standards of governance and management applicable to the transferring policies.

40. In reaching those conclusions, Mr Dumbreck explained that he was required by the regulatory guidance to consider the effect of the implementation of the Scheme on:

i) the security of policyholders' contractual rights, including the likelihood and potential effects of the insolvency of the insurer; and

ii) matters such as investment management, new business strategy, administration, expense levels, valuation bases and the cost and tax effects of the Scheme insofar as they may affect the security of policyholders' contractual rights, levels of service and their reasonable expectations.

41. It seems to me that this was obviously the correct approach. As is clear from the passage in the Court of Appeal's judgment cited above ([2020 EWCA Civ 1626 at paras 81 and 82) these conclusions, forming as they do part of the independent expert's report, are crucial to the process for sanctioning an insurance business transfer scheme. The consequence of the status given by statute to the role of the independent expert is that the court will not depart from his views without significant and appropriate reasons for doing so and is required to give his opinions full weight. This is most particularly the case where the question in issue relates to the financial and actuarial assessments required as regards the security of financial benefits. As the Court of Appeal made plain when referring to the roles of both the independent expert and the Regulators, the court is not itself an expert and should not substitute its own expertise for that of the entities required or entitled by statute to proffer their opinions.

42. In adopting that approach it is of relevance that, although the status of the independent expert bears some similarity to that of an expert witness whose duties are governed by CPR 35.3, they are not the same, not least because of the specific statutory code which governs their role. This point may not have been fully understood by a number of the objecting policyholders. As Pumfrey J explained in *In re Eagle Star Insurance Company Limited* [2006] EWHC 1850 (Ch) ("*Eagle Star*") at para 13:

> "*The foregoing considerations demonstrate that although the independent expert's report shares certain features of experts' reports prepared for the purpose of inter partes litigation, that is not its real nature. It is intended to be, and the FSA takes care to ensure that it is, an objective assessment of the scheme by a person to whom the importance of retaining their independence and objectivity has been repeatedly emphasised*."

43. It follows from the Court of Appeal's judgment that Mr Dumbreck's conclusions are ones to which full weight must be given. This is a strong pointer to a conclusion that the applicants have indeed established that the Scheme will not have a material adverse effect on the security of benefits under the transferring policies, the reasonable benefit expectations of the transferring policyholders or the standards of governance and management applicable to the transferring policies.

44. However, the Court of Appeal also made clear (at para 78) that the court is not a rubber stamp and (at para 81) that it remained the first duty of the court carefully to scrutinise, amongst other material the independent expert's report. It, therefore, "*must understand the opinions presented and is entitled to ask questions about them as necessary. It will do so, in particular, with a view to identifying any errors, omissions, or instances of inadequate or defective reasoning*". For that reason, I must delve rather deeper into why Mr Dumbreck expressed the conclusions he did.

45. I carry out that exercise even though the job has (anyway in part) already been done by the court. Although Snowden J refused to sanction the Scheme because of the weight he gave to other factors, he accepted ([2019] EWHC 2245 (Ch) at para 177) that the opinion of Mr Dumbreck that the Scheme would cause no material adverse effect upon the security of benefits and reasonable expectations of transferring policyholders as regards service standards and governance, is entitled to considerable weight. However, that view was expressed on the basis of the material then before him, which has in some respects changed, as has the nature of the arguments with which the court is now faced.

Reasonable expectations and service standards

46. Most of the debate at the hearing revolved around security of benefits. I shall turn to that aspect of the matter shortly. So far as the reasonable expectations of transferring policyholders as regards service standards and governance is concerned, the independent expert undertook an extensive review of the service standards that will apply firstly during the 12-month period subsequent to the date of transfer and thereafter on the transition to a new third-party provider. Mr Dumbreck compared the current service standards and those which will be provided in the future to transferring policyholders. He looked at a number of aspects of the arrangements that would be in place going forward including the impact of the Covid 19 pandemic and Brexit on policy administration. He concluded that:

> "*I am satisfied that the implementation of the scheme will not result in a material adverse effect impact on service standards experienced by holders of transferring policies*".

47. This is a conclusion which has been reviewed and given specific attention by the FCA. Although some of the objections which I will refer to a little later touch on this point, nothing that I have seen from the way in which future policy administration is described in the materials before me, indicates that this conclusion is wrong.

48. There is one other aspect of policyholders' reasonable expectations that requires consideration. It relates to the ability of some transferring policyholders to elect to commute their annuity income in return for a lump sum payment. This is an issue which affects annuities in payment in very limited circumstances (trivial commutation where a benefit becomes payable to a contingent beneficiary on the death of an annuitant and pension sharing orders) but is less restricted in the case of the six deferred annuities that are within the scope of the Scheme. The relevance is that PAC and Rothesay apply different commutation factors, which means that the Scheme might affect the way in which the discretion to commute is exercised once the transfer to Rothesay has taken place.

49. This issue has been reviewed by Mr Dumbreck and he has concluded that the impact of the implementation of the Scheme on the commutation terms available to transferring policyholders will not materially affect their benefit expectations. The reason that he has reached this conclusion relates in part to the relatively small differential impact, but also because the commutation factors for both PAC and Rothesay are not guaranteed and may change at any time in the future. In my view Mr Dumbreck's conclusion on

this issue is one that was open to him to reach and is one to which the court must give full weight accordingly.

Security of Benefits

50. The regular assessment of an insurer's financial position has to be determined in accordance with the recast EU Directive on the taking up and pursuit of the business of insurance and reinsurance (2009/138/EC) as transposed by (inter alia) The Solvency 2 Regulations 2015 (SI 2015/575) ("Solvency II"). This is part of the regulatory process for which the Regulators (and more especially the PRA) are responsible. The elements which matter for present purposes are the Solvency II Pillar 1 requirements, an insurers' capital management policies and the Solvency II Pillar 2 requirements. The implementation of these requirements is supervised by the PRA whose primary objectives include promotion of the safety and soundness of all the firms that it regulates and contributing to the securing of an appropriate degree of protection for those who are or may become policyholders. It must also as a secondary objective facilitate effective competition in the market, although Mr Weitzman stressed that this could not be in a manner that cut across its other objectives.

51. In furtherance of this regime, an insurer is required to hold sufficient capital to cover its technical provisions (in the form of its best estimate liabilities ("BEL") and risk margin), its other liabilities and its SCR. The BEL is determined by projecting the expected future obligations of the insurer over the lifetime of the insurance contracts using the most up-to-date financial information and best estimate actuarial assumptions. In making that determination, an assessment is made of the present value of the projected cash flows using a discount rate intended to reflect the risk-free rate of return. Where appropriate and permitted by the regulations, certain adjustments to this calculation can be applied, one of which, the matching adjustment, has proved controversial in these proceedings. I shall revert to it a little later.

52. The risk margin is a feature of an insurer's technical provisions which, as Mr Dumbreck explained, is designed to reflect the amount that another insurance or reinsurance undertaking would be expected to require in order to take over and meet the insurance obligations in an arms-length transaction. Other liabilities comprise all other liabilities of the insurer not directly related to its insurance obligations. The SCR represents the minimum required level of own funds in excess of an insurer's technical provisions (i.e. its BEL plus its risk margin) and other liabilities that insurers are required to maintain. The SCR is intended to ensure that the insurer remains able to meet its technical provisions over a period of one year with a probability of at least 99.5%. Mr Dumbreck said that the intention is that an insurer would remain able to transfer its obligations to a third party following a 1-in-200 year adverse event.

53. An insurer must hold own funds covering its SCR, and the amount in excess of the technical provisions, other liabilities and SCR is called excess own funds. A useful diagram which illustrates how the PRA applies the Solvency II regime to the regulation of insurers appears in the Court of Appeal's judgment ([2020] EWCA Civ 1626 at para 91). It is of importance to note that while the SCR is calculated by reference to the impact of an adverse scenario manifesting itself over a one-year period, it is not intended to relate merely to the insurer's ability to meet its outgoings during that year.

It relates to the ability of the insurer to meet its outgoings during the year and to meet its technical provisions in full at the end of the year, those technical provisions taking account of all the insurer's future obligations in respect of its existing business, however far into the future they may arise.

54. Another important aspect of an insurer's management of its exposure to risk is its internal capital management policy. This is reflected in the insurer's own internal determination of what it aims to hold by way of own funds in excess of the SCR, and is expressed as a percentage ratio of own funds to SCR. This is an internal management tool and in the case of Rothesay sets a target of 130% to 150%. The way that Mr Dumbreck explained the position is that, if this coverage exceeds 150% of SCR, Rothesay considers that it has excess capital than can be deployed or returned to shareholders, while if coverage is below 130%, action to improve the solvency position would be taken such as changing the investment mix, putting additional reinsurance in place, suspending the writing of new business, raising capital or reducing discretionary expenditure.

55. In reaching the conclusion that he did Mr Dumbreck compared the Solvency II financial positions of PAC's business pre-Scheme and Rothesay's business post-Scheme. This enabled him to assess the difference between the security of benefits available to annuitants by comparing the solvency metrics applicable to transferor pre-transfer and transferee thereafter.

56. PAC has a substantial with profits business, but Rothesay does not. However, Mr Dumbreck made clear that his analysis had no regard to the significant level of surplus assets that are present in PAC's with profits fund. He explained that this approach is consistent with the Solvency II rules and arises because the with profits sub-funds are ring-fenced, and therefore the surplus assets in those funds are held for the benefit of PAC's with-profits policyholders and would only be available to support other parts of PAC's business (including its obligations to the annuitants under the transferred policies) in extreme circumstances. I am satisfied that the correct approach is therefore to look primarily at what Mr Dumbreck called PAC's shareholder-backed business (i.e., its business without regard to the with profits fund) in carrying out that comparison exercise.

57. Mr Dumbreck explained that as at 30 June 2021:

i) The Solvency II Assets of PAC's shareholder-backed business net of other items were valued at £57.1 bn, with technical provisions of £48.6 bn. It therefore had own funds of £8.5 bn and an SCR coverage ratio of 182% (i.e., the percentage excess of own funds over SCR).

ii) Rothesay's Solvency II Assets net of other items were valued at £60.4 bn, with technical provisions of £53.2 bn. It therefore had own funds of £7.2 bn and an SCR coverage ratio of 204%.

58. If the Scheme is implemented, the SCR coverage ratio for the PAC shareholder business increases from 182% to 187%. The ratio for Rothesay remains unchanged, because it has already undertaken the economic effect of the Scheme through the Reinsurance Agreement. Mr Dumbreck was of the view that these SCR coverage ratios demonstrate that the effect of the Scheme will not be material to the regulatory solvency position of

either transferor or transferee. This means that it is most improbable that it will have a material adverse effect (as that phrase is defined in the Court of Appeal's decision ([2020] EWCA Civ 1626 at para 91) on the security of benefits for either the transferring annuitants or indeed any other stakeholder.

Matching Adjustment

59. However, there is one aspect of the actuarial metrics which requires further explanation and analysis, both because its operation affects PAC and Rothesay differently and because it is the subject of a current review by the PRA. This is the technique of matching adjustment which I mentioned earlier in the judgment. The implementation of matching adjustment does not have an equivalent effect on the financial position of both PAC and Rothesay, because of differences in the constitution of their respective businesses.

60. Matching adjustment is an actuarial technique which allows an insurer to value its long-term insurance liabilities by using a discount rate that is higher than the risk-free rate where those liabilities are matched by assets held as part of an investment strategy to "hold to maturity". The underlying reasoning is that the return from certain long-term assets includes an element which compensates the holder for their relative illiquidity. If, as is the case with certain types of business (of which non-profit in-payment annuity liabilities is one) the liabilities are predictable, the illiquid assets can be held to maturity thereby earning the portion of the yield which represents the assets' relative illiquidity. Matching adjustment therefore allows an insurer to take credit for the additional investment return in excess of the risk-free rate where they have a "hold to maturity" investment strategy for less liquid and higher yielding assets used to back the more stable and predictable liabilities of a book of business such as those in issue in this case.

61. Matching adjustment is specifically permitted by Solvency II (reg 42 of SI 2015/575), although an insurer's entitlement to use it requires the permission of the PRA. If the conditions for its use are satisfied, the PRA is required to approve an application for permission (reg 42(2)). Mr Dumbreck explained in his July report that one of the consequences of the relatively lengthy period of historically low interest rates is that more insurers have been investing in a wider range of illiquid assets in search of higher risk-adjusted yields. This has resulted in a significant increase in the extent to which matching adjustment is used and has the consequence that the applicable discount rate for calculating the BEL of annuity providers with regulatory permission to do so is increased while their SCR is lowered, thereby improving their solvency position.

62. Both PAC and Rothesay have the PRA's approval for the use of matching adjustment. So far as PAC is concerned it is used for some of its shareholder-backed immediate annuity business, although Mr Dumbreck explained that this no longer extends to that part of its business which is now reinsured by Rothesay under the Reinsurance Agreement. The nature of Rothesay's business is such that it uses matching adjustment for a much larger proportion of its business than does PAC.

63. The most up to date description of the extent of the divergence in use of matching adjustment is contained in Mr Dumbreck's October 2021 report. The evidence is that a recalculation of the solvency position of each of PAC and Rothesay by simply

stripping out the effect of matching adjustment is very misleading, but it is still appropriate to describe the effect of such an exercise in order to put in context the debate that arose at the hearing. In short, if matching adjustment were not to be applied at all, and there were to be no countervailing changes to other aspects of the metrics (which is said in itself to be improbable), the impact on PAC's shareholder backed business would be to reduce its SCR coverage ratio as at 30 June 2021 from 182% to 92%. So far as Rothesay is concerned the impact would be significantly greater. It would reduce the SCR coverage ratio from 204% to 17%.

64. The parts of the independent expert's reports dealing with the differences in impact that matching adjustment has on the financial position of PAC and Rothesay were identified by some objecting policyholders as giving rise to real concern. They included Mrs Penelope Howell and Mr Anthony Kell, both of whom addressed the court at the hearing, as did Dr Jay Ginn, who conjured up the rather arresting image of matching adjustment "*simply flattering the appearance in the way that a peacock's tail feathers make it look bigger, but it actually doesn't help the peacock to be fitter or stronger*". I think it is fair to say that these general concerns were expressed without any intimate familiarity with its operation, although it was plain that the general concept was one which was well-understood, and the root of the concern related to the impact that such a technique appeared on its face to have on an insurer's SCR coverage ratio.

65. These concerns were also expressed in circumstances in which the PRA is now engaged in a review of the way in which matching adjustment is applied. It also seems that in some instances the concerns of some annuitants have been fortified and enhanced by becoming aware of the views of a former employee of the PRA (Dr Dean Buckner) and an academic (Professor Kevin Dowd), who have made no secret of their belief that matching adjustment is deeply flawed and should not be being used for the purposes of determining the solvency position of any insurer.

66. Dr Buckner filed a number of documents in support of his position, two of which were substantively the same as two others. He did so even though he is not a policyholder, employee or other stakeholder with a legal relationship to either PAC or Rothesay. Part anyway of the reason that Dr Buckner wanted either he himself or Professor Dowd to be heard was in furtherance of their wider campaign against the use of matching adjustment as a technique for determining an insurer's regulatory financial position. This gave rise to the obvious difficulty that an interest in the subject, even though based on longstanding and strongly held views, is not in itself a sufficient ground to give rise to an entitlement to be heard on an application to sanction a Part VII scheme. For such an entitlement to arise, one or other of them needed to demonstrate that he was entitled to be heard in accordance with section 110 on the grounds that he is "*a person alleging that he is adversely affected by*" the Scheme.

67. In an attempt to persuade the court that they were so entitled, Dr Buckner and Professor Dowd said that the effect of the Scheme would be to make it more likely that there would be a call on the Financial Services Compensation Scheme ("FSCS") and therefore that policy premiums for other insurers would have to rise in order to fund the necessary pay-out. As future purchasers of insurance they said that they would therefore be adversely affected as a result. They also said that, in their capacity as taxpayers, they would lose financially if there had to be a taxpayer-funded bailout of the FSCS to enable it to continue to carry out its functions.

68. Mr Moore submitted that the statutory language is not wide enough to entitle a person to be heard on a Part VII transfer on the basis that a possible additional call on the FSCS would affect them either as a policyholder of another insurer or as a taxpayer. I agree. I do not consider that it is wide enough to extend to persons who allege, in a case such as the present, the adverse effect relied on by Dr Buckner and Professor Dowd.

69. In my view, the language of section 110 is plainly intended to ensure that policyholders, employees and others with a relevant relationship with the transferor of transferee should be able to appear without having to establish anything other than an allegation that they will be adversely affected by the Scheme, a point which was made by Mr Van Sante for the FCA. It also seems to me to be possible that the entitlement may extend to anyone with a relevant relationship who alleges adverse effect, even if the allegation is not objectively reasonable (c.f. in a slightly different context the views of Sir Geoffrey Vos C (with which Snowden J agreed) in *Re Barclays Bank Plc and others* [2017] EWHC 1482 (Ch) at para 28). The reason for this is that, from a regulatory point of view, I see some force in the argument that the legislature did not intend there to be any form of merits-based filter for those who wish to appear, so long as they themselves are capable of being adversely affected if their complaint, criticism or concern is held to be well-founded, however unlikely that may be.

70. However, the wording of section 110(1)(b) makes plain that the person who alleges that he would be adversely affected must show that he will sustain the adverse effect "*by the carrying out of the scheme*". This is the language of causation and, based on the way they assert their entitlement to appear, would require Dr Buckner and Professor Dowd to show that any risk of Rothesay becoming insolvent would be increased by the Scheme. I do not think that they come anywhere near demonstrating that is the case, not least because the economic effect of the transfer of the policies to Rothesay has already occurred through the Reinsurance Agreement; any insolvency of Rothesay cannot therefore be caused or contributed to by the carrying out of the Scheme.

71. In any event, if the only contexts in which a person will suffer an adverse effect are the indirectly related circumstances relied on by Dr Buckner and Professor Dowd, it seems to me that these effects are too remote from the carrying out of the Scheme irrespective of the Reinsurance Agreement. In my view there was an insufficient basis to show that it could properly be alleged that the carrying out of the Scheme will adversely affect them in the manner relied on and there was therefore no sufficient basis for saying that either of them was entitled to participate pursuant to section 110.

72. The consequence of Dr Buckner being informed by the court prior to the hearing that it was not satisfied that he was entitled to appear was that slightly amended versions of his two reports were then filed, not by himself but by Mr Kell. The opening paragraphs of the two new versions of the reports expressed themselves as being made to Mr Kell but were otherwise the same as those that had already been filed. They were then presented as material on which a person with undoubted standing wished to rely. The court was being asked, in support of Mr Kell's objections, both to consider the reports and to hear Dr Buckner.

73. This remained an unsatisfactory approach. The court had given no permission for Mr Kell to put in expert evidence and the procedure for sanctioning a Part VII transfer does not contemplate that objecting policyholders might seek to take that course. Indeed, it appears from *Eagle Star* that doing so would be inconsistent with the statutory regime

which gives the independent expert, approved by the PRA, the status of expert, with no provision for another expert (let alone an essentially self-appointed one) to mount a technical, opinion-based challenge to his views. As Pumfrey J explained in *Eagle Star* at para 13:

> "*Where it seems that the independent expert has identified the possible problems with a particular scheme and has, on what appear to be satisfactory grounds, rejected them, it seems to me that rather more than the normal requirement to give the opponent an opportunity to impugn the report is required before permitting that opponent either to see the independent expert's detailed workings or to instruct a further expert. It seems to me that there must be strong grounds for supposing that the independent expert has mistaken his function or made an error before a challenge to the report can be mounted*."

74. In the present case, matching adjustment was identified as an issue by the independent expert, who explained his views at some length. There is nothing in what he said which indicated that he had mistaken his function or made an error of the type contemplated by Pumfrey J. Furthermore, as I have said Dr Buckner is engaged in a campaign against the use of matching adjustment in the insurance industry and he could not be regarded as an independent expert, nor to be fair did he purport to be one or give any form of CPR Part 35 certification that he owed his primary duty to the court.

75. Nonetheless, having read his material, I decided to exercise the discretion which Mr Moore accepted I had, to permit Dr Buckner to address the court. I did so for two main reasons. First, his view had been adopted by more than one objecting policyholder and it seemed to me to be better to hear anything further that he himself wanted to say on the subject, rather than to hear a yet further revised version second-hand from an objecting policyholder who had adopted those views. Secondly, I was concerned to ensure that those policyholders who had genuine concerns about the issues raised by Dr Buckner should not be left with any concern that he was not given the opportunity to summarise his position and answer such questions about it as the court may have had.

76. This is not the first case in which both the principle of matching adjustment and the views of Dr Buckner as to its flaws have arisen on an application under Part VII. They also arose in a case in which Dr Buckner addressed the court as a policyholder: *Re The Equitable Life Assurance Society* [2019] EWHC 3336 (Ch) ("*Equitable Life*"), a decision of Zacaroli J handed down on 4 December 2019, i.e., between the decisions of Snowden J and the Court of Appeal in the present case. It is apparent from the judgment in *Equitable Life*, that in that case (as in this), Dr Buckner mounted what Zacaroli J called a root and branch attack on matching adjustment describing it as scientifically unsound and a practice that artificially created capital.

77. In *Equitable Life* the characteristics of the transferred business were different from those of the present case, but the context in which Dr Buckner mounted his attack is similar in the sense that matching adjustment was also used more by transferee than transferor and the effect on the transferee's SCR coverage ratio of stripping out matching adjustment (without more) also appeared to be significant. In that case the reduction in the pre-scheme SCR coverage ratio for the transferee if matching adjustment was stripped out was from 168% to 21%.

78. In the present case, Dr Buckner reiterated the specific criticisms of the nature of matching adjustment that he had made in *Equitable Life* and placed particular emphasis on the consequence for Rothesay's financial position of the extent of its utilisation. He said that one of the reasons matching adjustment gives rise to problems is the inherent uncertainty as to how the excess yield on the relevant asset is broken down into compensation for the asset's illiquidity and compensation for the credit risk.

79. He pointed out that this was also an issue which had been identified by the independent expert, because Mr Dumbreck was only satisfied that matching adjustment was as he put it "*appropriately calibrated in most circumstances*" and had said that the benefit available from a matching adjustment is sometimes greater than can confidently be justified. Dr Buckner also drew the court's attention to what he called the condemnation of matching adjustment in strong terms by a number of experts and authorities, whose views he did not adopt wholesale, but from which he concluded that there is a considerable difference of opinion between them and the independent expert.

80. Dr Buckner also expressed views about the role of the court as distinct from the role of the independent expert and the Regulators and how much weight the court should give to the evidence of the independent expert and the Regulators' lack of objection to the transfer. These are obviously legal matters, not matters for him. He accepted in any event that the court would always have difficulty making a judgment in cases like the present where there are what he called substantive disagreements between experts, but he expressed the view that this alone was a reason for refusing to sanction the Scheme. In the present case, the result for Dr Buckner of his concern about matching adjustment was that the risk of Rothesay needing external support in the future was not remote, that there is a material disparity between the external support potentially available for PAC and Rothesay and that there is significantly greater uncertainty about the insolvency risk of Rothesay compared to PAC.

81. I accept that there is some academic debate about the appropriateness of applying matching adjustment in a number of different contexts and I also accept that the views advanced by Dr Buckner are genuinely held. However, I do not agree that the evidence supports his conclusions about the consequences of applying matching adjustment to an assessment of the applicants' respective financial positions, nor do I agree that the evidence shows that his views on the flaws in the principle of matching adjustment are universally held. Indeed, I think that the way in which he sought to give the impression that the only respectable argument was the one which he maintained, let alone that this was demonstrably the case, was both tendentious and inaccurate in the way in which it sought to identify as applicable the sources on which it relied. It was also unbalanced in the way it relied on selective quotations from the materials to which it referred, more particularly where they emanated from the PRA.

82. I also agree with the submission made by the applicants and the PRA that these proceedings are not a suitable vehicle for reaching a view on the question of whether matching adjustment is flawed as a matter of principle, or even as to the way in which it has been applied in this or in any other case. In part this is because it is simply impossible for the court to rule on a debate of this character without proper expert evidence and cross-examination. Part VII proceedings in relation to a single, albeit substantial transfer, are not suited to the resolution of this kind of question and it could not in any event happen in the present case given the way in which the material put in by Dr Buckner through Mr Kell was adduced in evidence. This is one of the reasons

why the independent expert has the statutory status that he does. Given the nature of the procedure, prescribed as it is by the express terms of FSMA, it is the only practical way to proceed.

83. It is also clear that, although the PRA is engaged in a review of the way matching adjustment as a principle is used by some insurers, it is doing so against a background in which it accepts that the principle is an important part of the regime which facilitates an effective market for annuity products. The review is not yet concluded and, having considered Mr Dumbreck's views, I cannot draw any inference from the existence of the review that there is any material risk that matching adjustment is going to be dis-applied altogether from the statutory regime for regulatory reasons. He thinks that it is unlikely that the regulatory solvency benefit of the matching adjustment will not remain available over the long term, although I should record that Mr Weitzman made clear that the PRA was not able to give any indication as to the outcome of the review.

84. I have also been shown the published transcripts of two speeches given by senior individuals at the PRA and a letter to insurance company CEOs from the Executive Director, Insurance at the PRA all of which refer to the nature of the review. Mr Weitzman submitted that they reflect the fact that the appropriateness of the design and calibration of the matching adjustment is under review. I agree with that description, and I also agree with Mr Moore's submission that these materials are more consistent with good regulatory practice and a continuing advancement by the PRA of its statutory objectives (promoting safety and soundness and contributing to the securing of an appropriate degree of policyholder protection) than it is with any fundamental concern by the Regulators that matching adjustment is inherently flawed. As Mr Dumbreck said in his July report (and he gave further compelling reasons for this conclusion in his supplementary report):

> "*Whatever the arguments for and against its use, the Matching Adjustment is permitted under the Solvency II regulations (which still apply to UK insurers under UK law) and the PRA has granted approval for its use to a significant number of UK life insurers. While it is possible that the rules governing the Matching Adjustment may change for UK insurers, it is in my view unlikely that the Matching Adjustment will be discontinued or its benefits very significantly constrained*."

85. As I have already mentioned, I am also satisfied that an exercise in which the figures are reworked by simply stripping out the impact of matching adjustment is inherently misleading. I accept the applicants' submission that it is unhelpful to look at a picture which is the product of removing a particular feature such as matching adjustment when that feature can only sensibly be considered in the context of the regulatory regime as an interconnected whole. There was a graphic illustration of this in Mr Dumbreck's supplementary report where he explained that the removal of matching adjustment would be likely to lead to Rothesay (and indeed PAC) seeking approval for a recalculation of its Transitional Measure of Technical Provisions ("TMTP"). The impact of this would be to increase its SCR coverage ratio from 17% to 41%, which Mr Dumbreck considered to be a more plausible outcome, even in the unlikely eventuality of the removal of matching adjustment altogether. I understand Dr Buckner to disagree with this aspect of Mr Dumbreck's analysis, but he did not give any clear explanation of why.

86. More fundamentally, however, the principle of matching adjustment has been given statutory effect in the UK by Solvency II. The points raised by Dr Buckner give rise to political questions and are essentially advanced by way of challenge to the present regulatory regime and as a contribution to the question of whether the legislature ought to have permitted matching adjustment to be applied in the way that it has when insurers' solvency ratios are being calculated. In my view, it is very difficult to see how the court could properly conclude that a material adverse effect will be caused by the Scheme where the matters relied on as constituting the adverse effect do no more than reflect the proper and lawful application of rules for computing long-term solvency ratios which the legislature has authorised. It would mean that, while the court was bound to conclude that a firm was what Mr Weitzman called "prudentially secure", a transfer to that firm nonetheless resulted in a materially adverse effect to a policyholder.

87. I therefore agree with the submissions made by the applicants and the PRA that it is appropriate for me to take the same approach to the argument on matching adjustment as was taken by Zacaroli J in *Equitable Life* at para 83:

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

88. I should add that, at the heart of Dr Buckner's argument was his further contention that there was a material disparity between external support potentially available for each of PAC and Rothesay. I do not agree that the evidence establishes that is the case, but the difficulty with the argument in any event is that it has been ruled out as a relevant consideration by the Court of Appeal. Even if I were not to be bound by the decision of the Court of Appeal on this point, I would still regard its conclusion as correct. It is always open to the parent of any insurer to sell its shares, and indeed the ownership restructuring which has occurred in relation to both PAC as transferor and Rothesay as transferee in the present case is illustrative of the wisdom of treating it as an irrelevant factor.

89. For these reasons, I accept Mr Dumbreck's opinion that Rothesay in fact has a stronger financial position than PAC when measured by SCR coverage ratios. I also think that there is no legitimate basis to impugn his opinion that matching adjustment does not affect that conclusion. Accordingly, I also accept that I should consider whether or not to sanction the Scheme on the basis that its implementation will not have a material adverse effect on the security of the benefits of the transferring policy holders.

<u>The non transferring policyholders</u>

90. As to Mr Dumbreck's analysis of the effect of the carrying out of the Scheme on the non-transferring policies of PAC and the existing policies of Rothesay, he concluded that the SCR coverage ratio for PAC would increase from 171% to 175% and that the SCR coverage ratio of Rothesay would remain at 203% because of the existing effect

of the Reinsurance Agreement. He therefore concluded that the carrying out of the Scheme had no material adverse effect on those categories of policyholder.

91. As I have already mentioned, concerns about the position of non-transferring policyholders (of both PAC and Rothesay) did not lead to any material objections by policyholders falling into those categories, objecting in their capacity as such. I am satisfied that the conclusions reached by Mr Dumbreck as to their position are conclusions to which I should give full weight and that there is no basis on which I could decide that they are vitiated by any error or misunderstanding as to the effect of the Scheme on those policyholders.

Other objections to the Scheme

92. By the time of the hearing before me, the Regulators had been put on notice that PAC had received 1,374 policyholder objections to the Scheme, the majority of which were communicated by telephone but 235 of which were in written form. This is obviously a substantial number of people, but in percentage terms is less significant – it amounts to less than 0.5% of the total number of annuities proposed to be transferred. It follows that annuitants holding somewhere in excess of 99.5% of the transferred policies have not objected to the proposal in any way. Nonetheless, it is not surprising to find that a large majority may not wish to go to the trouble of actively objecting to the Scheme (let alone opposing it) even if they have no enthusiasm for what is proposed. An objection by even a single policyholder is worthy of the most careful consideration if it is based on good and substantial grounds, most particularly if it exposes some deficiency in the approach adopted by the independent expert or the Regulators.

93. The nature of their objections were many and various and, for the purposes of computing the numbers who objected and the reasons they did so, it was assumed that policyholders who had objected at the hearings before Snowden J and the Court of Appeal maintained their objections unless they were specifically withdrawn. The court, the Regulators and PAC all continued to receive objections in writing up until the date of the hearing (indeed material continued to be received by the court thereafter, although it reiterated, albeit in expanded form, points which had already been made), but in the event, only six individuals appeared in person. Each of them had also appeared as objectors at the previous hearings, although three of the six had taken advantage of the ability to instruct counsel, paid for as I understand it by PAC and Rothesay, to represent them in the Court of Appeal.

94. In the light of the very significant number of objections that were received, it is neither practicable nor necessary for me to go through them one by one. I have, however, read an extensive sample including in particular all of the written objections in respect of which the objecting policyholders expressed a wish that their views be brought to the attention of the court and all of those from policyholders who indicated that they may have wished to attend the hearing, although as I have said in the event only six attended in person.

95. Having carried out that exercise I am satisfied that the court has a good and complete picture of the themes which emerged. Those themes are also described in appendices to the reports from the PRA and the FCA and in the two reports prepared by the

independent expert. I propose to give my conclusions by reference to those themes. Where appropriate I shall pick up instances in which one or more of the themes was addressed by one or more of the policyholders who appeared at the hearing.

96. I should say straightaway that it was clear to me that almost all of the objectors had genuine, strong and heartfelt feelings about the Scheme. Many of them felt the proposals being advanced by PAC and Rothesay were inappropriate and wrong. Some, like Mr Thomas Copsey who addressed me in person, could not understand how PAC was continuing with the transfer when it seemed (as Mr Copsey put it) to be trashing its well-established reputation by doing so. But that last point is not a relevant factor. It is matter for PAC's directors to determine whether or not its reputation will be damaged by the Scheme.

97. I have no doubt that most of the annuitants who made these types of point, including Mr Copsey, were motivated by a genuine belief that they were being let down by an institution in which they had had confidence and trust. This was made much worse for many of them by a sense of outrage that they could be moved from being an annuitant of what has elsewhere been described as an old and venerable institution to an annuitant of a much younger insurer of which most of them had never heard before they were first informed of these proposals. This was made all the worse by the fact that it is being done at a time in their lives at which security was particularly important to them.

98. Many policyholders felt a strong affiliation with PAC, derived from their views as to its strength, history, trustworthiness and reputation, strengthened in many cases by their previous experience of dealings with PAC. This was often expressed by reference to a negative perception of Rothesay including concerns about its financial strength and track record, negative experiences they had had with it in the past, concerns about the level of service likely to be provided post-transfer, concerns about being exposed to a company with a less favourable credit rating than PAC and concerns about their personal details being shared with Rothesay. Many were concerned most of all by the fact that Rothesay was a much younger institution than PAC.

99. These concerns were often expressed in a manner which reflected the subjective views of individuals as to their own personal likes, dislikes and preferences. That is very understandable, but I am not able to take them into account for that reason. The Court of Appeal has made clear that these kinds of consideration are legally irrelevant. So long as the transfer of the annuitants' policies to Rothesay through the Scheme does not lead to them suffering an adverse effect which is material, in the sense that there is a possibility that cannot sensibly be ignored of real and significant risk to their position as annuitants, the legally relevant circumstances of the case will point towards the court making an order to sanction it.

100. It seems to me that this is the case for any subjective concern of that character or quality however expressed, but it may be helpful to address how the line is to be drawn by reference to what was said to the court by Mrs Howell during the course of the hearing. She said the following: "*It is totally not acceptable to force policyholders to have their annuities transferred to a company that has only been trading for approximately 12 years and has limited funds from a company that they feel safe with and can totally rely on. ... There is no way that the annuitants can trust that their interests will be protected with a company that already shows that it has financial problems and that the transferred funds will not have the same protection.*"

101. The Court of Appeal has confirmed that the reference to the age of Rothesay and how an annuitant feels about PAC is irrelevant. What would be relevant is if there were to be objective evidence to back up a concern that Rothesay had insufficient funds to protect the benefits to which the annuitants are entitled.

102. Some of the more specific concerns were driving at more objective questions (even though they were misplaced): e.g., a perception about risk exposure to the American market and concerns that because Rothesay is a Scottish company their annuities may be at risk if Scotland became independent from the United Kingdom. In so far as the concerns were based on objective criteria, the independent expert has taken the view that there are no objective reasons to believe that transferring policyholders will have a materially different experience as Rothesay policyholders from the one they would have done if they had remained PAC policyholders. It is clear that both the PRA and the FCA have considered the concerns from a regulatory perspective and have reached he same view and there is no basis on which I can reach a different conclusion.

103. One of the themes which was also raised related to policyholder servicing elsewhere in the EEA given the fact that there are a number of EEA states in which more than 100 policyholders are resident (although PAC considers it to be improbable that those states will have been the state of commitment for any of the transferring policies). This issue has been considered by Mr Dumbreck and both of the Regulators. They have all concluded that the advice taken by PAC indicates that there is no expectation that the implementation of the Scheme itself will have any adverse effect on policyholder servicing. There is nothing in the materials which have been put before the court which causes me to consider that these views may be misplaced or wrong

104. The passage from what Mrs Howell had to say also pointed up another theme which was raised by a large number of objecting policyholders. This was a comparison exercise between the position of PAC and the position of Rothesay. Like many of the concerns expressed by the annuitants, it is one that is understandable at first blush, but it ultimately focuses on the wrong point. The reason for this is that any adverse effect must be material in the sense explained by the Court of Appeal. This is well-illustrated in an oft-cited passage from the judgment of David Richards J in *Re Royal and Sun Alliance Insurance Plc* [2008] EWHC 3436 (Ch), itself approved by the Court of Appeal in the present case ([2020] EWCA Civ 1626 at para 49):

> "*Accordingly, in approaching this application I shall be concerned to see whether there is any material adverse effect on the position of policyholders in any of the three groups to which I have referred. The word "material" is important. The court is not concerned to address theoretical risks. It might be said that a transfer of business from a very large company to a large company involved a reduction in 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*"

105. Another theme was that policyholders were entrusting their savings to PAC to secure something that they thought was inalienable, in the sense that it would always be PAC which was the entity with which they would have a relationship. This point was developed, albeit in a slightly different manner, in the submissions made to me by Mrs

Kornelia Robertson and Mrs Howell. Mrs Robertson said that the problem for many was the compulsory moving of an annuitant away from his or her chosen insurer. She said that for her part she did not have anything against Rothesay, but she picked PAC for a reason and that is where she wants to stay.

106. Mrs Howell illustrated this point by drawing my attention to the Key Features document for her annuity which contained the following statement: "*Once you have bought your pension annuity with the money from your pension arrangement you cannot move the money back again and you are committed to receiving an income from Prudential for the rest of your life*". She said that this constituted a commitment by PAC to pay an income for the rest of her life. She said that PAC would be breaking the agreement by trying to sell to Rothesay the many hundreds of annuities that they sold under this guarantee. There was she said other material to the same effect.

107. There was an additional aspect to this complaint to the effect that it was unfair that PAC could transfer its obligations to Rothesay through the use of Part VII, while the annuitants themselves were bound to continue with PAC in all circumstances, unless compulsorily transferred irrespective of their wishes as part of a Part VII transfer. The unfairness said to exist boiled down, I think, to a lack of mutuality as between the position of the insurer who is not so restricted and the position of the policyholder who is.

108. This point was considered by Snowden J at first instance ([2019] EWHC 2245 (Ch) at para 104). He agreed with the FCA's submission that it is implicit in the power of the court under section 112(2A) of FSMA to make provision in an order under Part VII for the transfer of liabilities which would not otherwise be capable of being transferred without a person's consent, that the operation of Part VII cannot be prevented by contractual mechanisms. He also decided (para 113) that nothing he was shown amounted to a binding contractual commitment by PAC not to seek to transfer their annuities to another insurer. The statement in the Key Features document relied on by Mrs Howell was, he said, not dealing with PAC's commitment to the annuitant, but was simply dealing with the annuitant's commitment to PAC. I agree with both of those conclusions.

109. However, although Snowden J concluded that there was no contractual bar on the transfer and that it was permitted by the legislation in any event, he relied on what policyholders had been told in his finding that full weight needed to be given to policyholders' reasonable assumptions that PAC would not transfer its obligations under the annuity policies to another company. This was part of the foundation for his more general finding that the nature of an annuity was such that a policyholder's decision to contract with PAC itself carried significant weight in determining whether the court should exercise its discretion to sanction the Scheme (see in particular ([2019] EWHC 2245 (Ch) at para 180).

110. However, the Court of Appeal reached a very different conclusion on this point. As I have already explained earlier on in this judgment it said ([2020] EWCA Civ 1626 at para 121):

> "*we conclude on this issue that the judge ought not to have accorded any weight to the facts that the objecting policyholders (a) chose PAC on the basis of its age,*

> *venerability and established reputation, and (b) reasonably assumed that PAC would provide their annuity throughout its lengthy term*".

This could not be a clearer statement of principle. The law, therefore, requires the court to conclude that the types of consideration on which Mrs Howell, amongst others, placed so much weight is legally irrelevant to a determination of whether or not the court should sanction the Scheme. In other words, I am required by law to leave it out of account.

111. Another theme was a concern about the Rothesay asset base. This was expressed by Dr Ginn in the following way, which provided a fair summary of what a number of other policyholders had to say on the subject. She said that it seemed to her to be quite possible that Rothesay holds a riskier set of assets than PAC seeking an excess yield above the risk-free rate of gilts. She said that she was not reassured about the reliability of the investments made by Rothesay.

112. In general terms this concern is not made out by the evidence. Mr Dumbreck identified market risk as being one of the risks inherent in PAC's shareholder backed business, while Rothesay managed that risk because of the structure of its investment portfolio with a higher proportion of investments in fixed income securities than PAC. In any event the asset spread has been taken into account by Mr Dumbreck in the conclusions he has reached, making clear that the riskier the asset, the higher the level of capital required to satisfy the prudential requirements.

113. Mr Mitchell said that he had particular concerns about the extent of the investments held by Rothesay linked to ground rents, the impact of which were considered in the part of Mr Dumbreck's report that also considered the extent of Rothesay's exposure to lifetime mortgages. Mr Dumbreck had analysed the extent of Rothesay's exposure to those two forms of asset and said that the ground rent investments amounted to what was approximately 5% of Rothesay's asset base and the lifetime mortgages amounted to approximately 7.5%. He concluded that the extent of Rothesay's exposure to each of these asset classes would not have a material adverse effect on the security of benefits to be provided under the policies being transferred under the Scheme. This was reflected in the fact that, as Mr Weitzman explained, the composition of the portfolio is reviewed by the PRA as part of its supervisory role and that review has not caused it to decide that it should do anything other than confirm its non-objection to the Scheme.

114. Dr Ginn also expressed concerns about Rothesay's concentration on only annuities which meant that it had all of its eggs in one basket. This was a point based on a concern that Rothesay was a monoline insurer while PAC was not. The point is correct in the limited sense that Rothesay's business is less spread than that of PAC. But the critical answer is that this is a factor which is recognised by both Mr Dumbreck and the Regulators and has been taken into account by them in the conclusions they have reached. She also said that she was concerned about the possibility of further trading in the transferred annuities. That is not a concern to which I can attach any weight because any further transfer from Rothesay would itself require the sanction of another Part VII scheme.

115. Another theme, this time addressed by Mr Mitchell, related to what he called the chain of reinsurance. Some of what he had to say was concerned with his inability to obtain details in relation to PAC's and Rothesay's reinsurance, which he says he has been

trying to get to the bottom of for a very long time. I do not consider that Mr Mitchell has established a failure by PAC to provide him with information to which he was entitled, but in any event the outwards reinsurance arrangements of PAC and Rothesay were considered by Mr Dumbreck in some detail and do not affect his conclusions on the security of benefits. There is no basis on which the court might be able to reach a different conclusion.

116. Another theme was a concern about the independence of Mr Dumbreck. As Mr Copsey explained, he was concerned about this issue and in particular the way in which the independent expert had produced so many drafts which were as he put it supplied in multiple draft formats to the PRA and the FCA. Mr Kell and Dr Ginn also raised this issue. Dr Ginn said that she derived little comfort from the fact that the Scheme had received what she called the express satisfaction of the independent expert, the PRA and the FCA because they all seemed to be "*marking each other's homework*".

117. I think that this particular criticism betrayed a misunderstanding of the process, which involves the PRA approving the form of the report but not the conclusions. But in any event, and notwithstanding what has been said by amongst others Mr Kell, I have satisfied myself that there are no grounds for thinking that Mr Dumbreck was not sufficiently independent to carry out his task in an appropriate manner. The fact that his fees were paid by the applicants and that he received instructions and information from them on the matters in relation to which he was required to report is not itself a cause for concern. They are necessary incidents of the task the statute requires the expert to carry out and the criticism does not give adequate weight to the statutory framework which gives the PRA a regulatory role in relation to the appointment and work of the independent expert. As Mr Weitzman explained in his submissions, Mr Dumbreck's independence was kept under continual review by the PRA throughout the process and it would be a matter of "*very great concern*" if the PRA thought that his report reflected anything other than his own independent views.

118. There is one final aspect of the way that Mr Dumbreck has approached his task which I have taken into account. In both his main and his supplementary report, he, like the Regulators, has responded to many of the concerns that have been raised by objectors. He has classified them and addressed them by theme. In many respects his responses are the same as or are consistent with the views of the Regulators, but in my view that does not give any substance to the views on this point of Mr Copsey, Mr Kell and Dr Ginn (amongst others). Nothing that I have seen causes me any concerns that Mr Dumbreck and the Regulators have done anything other than express opinions which they genuinely hold in relation to the matters raised. Finally, I should add that concerns about the independence of Mr Dumbreck were also raised before Snowden J and rejected by him ([2019] EWHC 2245 (Ch) at para 89).

119. I should also mention the fact that, as sometimes happens in applications to sanction business transfers under Part VII, there are a number of references to the dissatisfaction which individual annuitants have with the services they have received from PAC. Some of them, and I think that Mr Mitchell and Mr Kell both fell into this category, have taken advantage of the proceedings as a platform to express that dissatisfaction. This applies to Mr Kell's apparent concern about his inability to obtain documentation relating to his annuity, a concern which he is entitled to pursue through any available complaints' procedures (although I understand that there is no issue that he is an annuitant with the right to receive payment).

120. All I shall say about that is that it would not be right for me to express any views about the substance of those types of individual complaint, because these proceedings are not a proper forum for them to be ventilated. To the extent that he has rights as an annuitant or policyholder against PAC, it is clear from the Scheme they will become rights against Rothesay. It is also clear from Mr Dumbreck's report that he is satisfied that the service Mr Kell will receive in the vindication of those rights will not be adversely affected by the carrying into effect of the Scheme. The fact that I make no further mention of them is simply because they have no further legal relevance to the issue which I have to decide.

Summary of the Position of the Regulators and their attitude to the Scheme

121. The PRA has filed a number of reports in which it explains its views as to the Scheme. The PRA's conclusion in its latest (fifth) report dated 29 October 2021 is that:

> "*Having considered the Scheme in light of the PRA's statutory objectives (promoting the safety and soundness of PRA-authorised persons, contributing to the securing of an appropriate degree of protection for those who are or may become policyholders, and acting in a way which, as a secondary objective, facilitates effective competition), the PRA currently is not aware of any issue that would cause it to object to the Scheme. Accordingly the PRA does not object to the Scheme.*"

122. As explained by the Court of Appeal, the non-objection by the Regulators is a matter to which the court is required to accord full weight. The court is not permitted to depart from it without significant and appropriate reasons for doing so. While the court is required to examine what is said with care, it should not substitute such expertise as it has for that of the Regulators on those aspects of the matter on which advancement of their statutory objectives makes it necessary or appropriate for them to proffer their own opinion.

123. The views that the PRA expressed were given having seen summaries of the policyholder objections that I have already described and having said that they do not consider that any of them have any material impact on the statutory objectives (i.e., those referred to in that citation) or give it any reason to object to the Scheme. This amounts to confirmation that it does not consider that the objections have a material impact on the promotion by the PRA of the safety and soundness of PAC and Rothesay as PRA-authorised persons, or the PRA's contribution to the securing of an appropriate degree of protection for those who are or may become policyholders. When considering the question of whether there is any material adverse effect to annuitants as a result of the Scheme, that too is a conclusion to which the court is required by the Court of Appeal ([2020] EWCA Civ 1626 at para 82) to accord full weight.

124. It is also of central significance that these views are expressed by the PRA in the light of its focus on the security of benefits for policyholders assessed in accordance with the application of Solvency II. It considers that it has applied the statutory regime in accordance with its terms and the debate about matching adjustment does not amount to a challenge to the fact that the statutory regime exists in the way I have described. Such challenge as there is, is simply to the wisdom of the regime in the first place.

125. To similar effect, the FCA's conclusion in its latest (fourth) report also dated 29 October 2021 is that:

> "*Based on the information and considerations set out in the Third FCA Report and this report, the FCA is satisfied that the Scheme is within the range of reasonable and fair schemes available to the Transferor and Transferee. Accordingly, the FCA does not object to the Scheme*."

126. The reports of the FCA, like those of the of the PRA, express views to which I am required to accord full weight. The court must take account of the fact that the FCA considers that the Scheme is within the relevant range and is not therefore in its view unfair or unreasonable. Having examined the reports of both Regulators, I am satisfied that there are no regulatory objections to the sanction of the Scheme, and that the Regulators' conclusions to that effect are not vitiated by any errors, omissions or instances of inadequate or defective reasoning.

Conclusion

127. While the Court of Appeal contemplated that there will be cases in which other circumstances may have a material impact on the exercise by the court of its discretion under section 111(3), it also made clear that the paramount concern of the court in a case such as the present will be to assess whether the transfer will have any material adverse effect on the receipt by the annuitants of their annuities (and indeed on the receipt of payments by other annuitants, policyholders and creditors of the transferor and the transferee). Service standards to be provided to the annuitants are also important, but I have not been persuaded that there are any other circumstances, the consideration of which calls into question the conclusions I have reached based on the security of policyholder benefits.

128. I am satisfied that the statutory requirements for sanction have been met. I am also satisfied, having particular regard to the views of Mr Dumbreck as the independent expert and the non-objection of the Regulators, but also taking account of all the objections raised by those annuitants who objected, whether in writing by telephone or in their address to the court, that in all the circumstances of the case the Scheme is an insurance business transfer scheme that I should sanction. I will therefore make an order accordingly.