Neutral Citation Number: [2019] EWHC 111 (Ch)

Case No: FS-2018-000003

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**
**FINANCIAL SERVICES AND REGULATORY**

7 Rolls Building
New Fetter Lane
London, EC4A 1NL

Date: 25/01/2019

**Before**:

**MR JUSTICE HILDYARD**

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**IN THE MATTER OF:**

**SANTANDER UK PLC**
**- and -**
**ABBEY NATIONAL TREASURY SERVICES PLC**
**(together, "the Companies")**

**AND IN THE MATTER OF:**

**PART VII OF THE FINANCIAL SERVICES AND MARKETS ACT 2000 ("FSMA")**

**MR MARTIN MOORE QC AND MR STEPHEN HORAN** (instructed by Slaughter and May) appeared on behalf of "The Companies".
**MR RORY PHILLIPS QC AND MS SOPHIE MALLINCKRODT** appeared on behalf of the Prudential Regulation Authority and the Financial Conduct Authority.
**MS CHARLOTTE EBORALL** (instructed by Ernst & Young LLP) appeared on behalf of the Skilled Person

# 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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MR JUSTICE HILDYARD

## MR JUSTICE HILDYARD :

### *Introduction*

1. After a two-day hearing on 11 and 12 June 2018, I decided to sanction a ring-fencing transfer scheme under Part VII of FSMA ("the Santander Scheme" or "the Scheme") proposed by Santander UK Plc and Abbey National Treasury Services Plc ("Santander UK" and "ANTS" respectively and together "the Companies"). The purpose of this judgment is to elaborate, at the request of the parties, on the short reasons I gave then for my decision.

2. A ring-fencing transfer scheme or "RFTS" is a statutorily-mandated process for the separation of the relevant banks' retail banking business from their (potentially riskier) wholesale and investment banking activities. The process is governed by provisions also newly introduced into Part VII of the Financial Services and Markets Act 2000 ("FSMA"), and in particular by a new Part 9B which was introduced into FSMA by section 4(1) of the Financial Services (Banking Reform) Act 2013 ("FSBRA").

3. FSBRA represents a multi-layered response to the financial crisis of 2008 and 2009. It is all part of a package designed to strengthen the UK's larger high-street banks and to provide additional protection to their retail and small business customers. Ring-fencing, which is mandated in respect of UK retail bank operations above a specified size, is an essential part of that response: it is mandatory and has to be effected by 1st January 2019.

4. Sir Geoffrey Vos CHC has described ring-fencing as "a statutory project on an unprecedented scale." As noted in the skeleton argument provided to me on behalf of the Prudential Regulation Authority ("PRA") and the Financial Conduct Authority ("FCA", and with the PRA together, "the Regulators"),

> "Implementation is a highly complex project of national importance. It will be relevant to millions of retail banking customers in the UK."

5. A ring-fencing scheme is inevitably highly detailed and complex. After detailed consideration by statutorily-designated persons, and especially the Regulators and the person appointed under section 109A FSMA to report on the RFTS Scheme (the "Skilled Person"), an RFTS must ultimately be put before the Court for its sanction before it can be given effect.

6. The Santander Scheme is the fourth and last of a series of RFTSs presented to this Court for sanction, such schemes having already been sanctioned by this Court in the case of Barclays, Lloyds and HSBC.[1]

[1] On 9 March 2018, Sir Geoffrey Vos CHC sanctioned the RFTS proposed by Barclays Bank plc and Woolwich Plan Managers Limited (the "Barclays Scheme"); on 12 April 2018, Hildyard J sanctioned the scheme applied for by three companies in the Lloyds Bank Group (the "Lloyds Scheme"); and on 21 May 2018 the proposed scheme of HSBC Bank plc was sanctioned by Sir Geoffrey Vos CHC (the "HSBC Scheme"). (The Royal Bank of Scotland plc's RFTS was also sanctioned earlier this year by the Court of Session in Scotland (the "RBS RFTS").)

***Representation at the hearing before me on 11 and 12 June 2018 to consider whether the Santander Scheme should be sanctioned (the "Sanction Hearing")***

7. In considering the detailed provisions governing the Santander Scheme and in reaching my decision, I have had the benefit of comprehensive submissions both written and oral from Mr Martin Moore QC, leading Mr Stephen Horan, who appeared for the Companies; from Mr Rory Phillips QC, leading Ms Sophie Mallinckrodt, who appeared for the Regulators; and from Ms Charlotte Eborall, who appeared for the Skilled Person.

8. I have also, of course, had the benefit of the judgments given by the Chancellor in two of the preceding RFTSs, as well as my own experience from the Lloyds Bank RFTS. An additional benefit of those earlier judgments is that I think it unnecessary to rehearse at length in this judgment the description there given of the details of the ring-fencing regime introduced as Part 9B of FSMA, and the requirements for the implementation of ring-fencing by a RFTS. Those earlier judgments go into those matters at some length. For example, in his judgment in the Barclays RFTS (*Re Barclays Bank plc and others* [2018] EWHC 472 (Ch)) the Chancellor described the legislation enacting the ring-fencing regime at paragraphs 10 to 11, and the legislation concerning applications for sanction of such schemes and the Court's obligations and powers, at paragraphs 13 to 21. I addressed these matters in my judgment in *Re Lloyds Bank plc and others* [2018] EWHC 1034 (Ch) at paragraphs 11 to 15 and 16 to 33 respectively.

9. As also appears from those judgments, in each of the three RFTSs which have come before this Court previously there have been numerous statements of representation filed on behalf of persons who considered themselves to be potentially adversely affected by the scheme, and at least one objector appeared in person at the relevant sanction hearing, in each case pursuant to the rights expressly conferred by section 110 of FSMA. In this case, only one written representation was received, from a Mr Robert Brown who had lodged the same objection with all three of the preceding RFTSs in the English Courts, and also with the RBS RFTS in the Scottish Courts. On this occasion, Mr Brown confirmed that he did not wish to appear at the Sanction Hearing. I deal later with his written representations.

***Structure of this judgment***

10. I propose to address the matters relevant to my decision under the following headings and in the following sequence:

[A] Description of the Santander Group *(paragraphs [11] to [14])*;

[B] Procedural antecedents and chronology prior to the Sanction Hearing *(paragraphs [15] to [18])*;

[C] Notification, the Communications Plan and its implementation *(paragraphs [19] to [23])*;

[D] Jurisdictional pre-conditions and their satisfaction *(paragraphs [24] to [45])*;

[E] The Court's role and discretion, as explained in previous judgments *(paragraphs [46] to [52])*;

[F] Basic design of the Santander Scheme *(paragraphs [53] to [58])*;

[G] Rationale for the design of the Santander Scheme *(paragraphs [59] to [65])*;

[H] The Statutory Question and the role of the Skilled Person *(paragraphs [66] to 80])*;

[I] Principal features of the Santander Scheme *(paragraphs [81] to [122])*;

[J] Brexit *(paragraphs 123] to [143])*;

[K] Customer queries, concerns, representations and formal objections *(paragraphs [144] to [152])*;

[L] Proposed amendments to the Santander Scheme *(paragraphs [153] to [155])*;

[M] The Skilled Person's Supplementary Report and his conclusions in detail *(paragraphs [156] to [163])*;

[N] Conclusions on whether the Court should sanction the Santander Scheme *(paragraphs [164] to [165)*; and

[O] Form of Order *(paragraphs [166] to [175])*.

## *[A] Description of the Santander Group*

11. The current structure of the Santander Group, so far as relevant, is as follows:

    (1) Banco Santander S.A. ("Banco Santander") is the ultimate parent company of the global Santander Group ("the Santander Group"). Banco Santander directly or indirectly controls 100% of the voting rights of both Companies.

    (2) Banco Santander controls 100% of the voting rights in Santander UK Group Holdings plc ("UK HoldCo"), which is the immediate direct parent undertaking of Santander UK, the First Applicant.

    (3) ANTS, the Second Applicant, is a wholly owned subsidiary of Santander UK.

12. Cater Allen Limited ("CAL") is also a wholly owned subsidiary of Santander UK. It is a private bank for high net-worth individuals and business customers and, like Santander UK, will become a ring-fenced body ("RFB"). No business will be transferred by or to CAL under the Scheme.

13. Santander UK, ANTS and CAL are UK banks that carry on a combination of retail, wholesale and markets business. In particular:

    (1) Retail banking is currently undertaken by Santander UK and, to a smaller extent, CAL. The retail brands of the Santander UK business include

Santander, Cahoot (Santander UK's online-only banking service), Santander Select, Santander Private, Santander for Intermediaries and Cater Allen.

(2) The corporate and commercial banking brands are Santander Business (SME and business customers) and Santander Corporate & Commercial ("SCC"). ANTS undertakes elements of the business of the SCC division.

(3) Santander Global Corporate Banking ("SGCB") is the brand for larger corporate and international customers. ANTS undertakes the majority of the wholesale banking and markets business of SGCB.

14. Santander UK, ANTS and CAL all have PRA permissions to carry on the regulated activity of accepting deposits and acting as a credit institution.

### *[B] Procedural antecedents and chronology*

15. The Sanction Hearing was the culmination of a long process in which the Court had been involved at various stages.

16. Indeed, and (as I have noted in my previous judgments on RFTSs) exceptionally, the Court was involved even before any application in respect of the Santander Scheme (or any ring-fencing scheme) had been filed: this was to obtain the Court's directions for an orderly process and to give the Companies comfort, in the context of a novel jurisdiction, as to how to proceed.

17. The sequence was, in summary, as follows.

(1) The PRA, after the required consultation with the FCA, approved the appointment of Mr John Cole of Ernst & Young LLP ("Mr Cole" or "the Skilled Person") as the Skilled Person in respect of the Santander Scheme by letter dated 22 September 2016. This was reconfirmed on 3 April 2017.

(2) On 26th May 2017, and thus prior to the filing of the present application, Sir Geoffrey Vos CHC and Snowden J gave prospective general guidance to Barclays, HSBC, Lloyds and Santander on their RFTSs, in relation to: (i) their proposed communications programmes; and (ii) the timetable of hearings for their sanction applications (*Re Barclays Bank plc and others* [2017] EWHC 1482 (Ch)).

(3) On 27 October 2017, and in light of the prospective guidance that had been given as explained above, I provisionally approved certain key elements of the Companies' proposed "Communications Plan", as described and on the basis summarised in my judgment in the matter ([2017] EWHC 3530 (Ch)).

(4) Having consulted with the FCA, the PRA approved the form of the "Scheme Report" prepared by the Skilled Person (as required by section 109A FSMA) by letter dated 15 January 2018.

(5) Thereafter, having again consulted with the FCA and taken the Scheme Report (or a final draft) into account, the PRA, by letter dated 18 January

2018, consented to the making of the present application (such consent being a pre-requisite of such an application under section 107(2A) FSMA).

(6) On 5 February 2018, at the first hearing for directions after the actual issue of the application, I made further directions ("my February Order") in respect of the proposed Communications Plan and also in respect of the form of guidance to be given to persons wishing to make representations about the Scheme. That guidance followed closely what the Chancellor had directed at a hearing of the Barclays Scheme on 10 November 2017 ([2017] EWHC 2894 (Ch)). The reference for my judgment dated 5 February 2018 is [2018] EWHC 1242 (Ch).

(7) A Case Management Conference took place on 25 May 2018, at which I gave final procedural directions for this hearing.

(8) On 31 May 2018 the Skilled Person issued his "Supplementary Report" and on 7 June 2018 a (short) addendum thereto.

(9) On 5 June 2018, the PRA: (a) certified its approval of the application for sanction, as required by section 111(2)(ab) FSMA; (b) certified that Santander UK had or would possess before the Scheme took effect, adequate financial resources ("the CFR"); and (c) certified that the ECB, as home state regulator of Banco Santander, was notified of the Scheme on 6 February 2018 and the ECB responded to the notification, without comments, on the same date.

18. It is convenient to note here also that the PRA's consent to and approval of the sanction application relating to the Santander Scheme (the "Sanction Application") connotes that it has been satisfied that the London branch of Banco Santander ("SLB", which is the transferee from ANTS of prohibited and certain specified permitted business and is registered in the United Kingdom as a UK establishment of Banco Santander and subject to regulation by the FCA and PRA), as well as Santander UK, has all regulatory authorisations and permissions required to conduct its business, including the business to be transferred to it under the Scheme: and see further below.

### *[C] Notification, the Communications Plan and its implementation*

19. As emphasised by Sir Geoffrey Vos CHC and Snowden J in *Re Barclays Bank plc and others* [2017] EWHC 1482 (Ch), the necessity to notify persons who might be likely to be adversely affected by the relevant RFTS is an important feature of Part VII FSMA in its application to RFTSs, not least in the context of providing the information necessary to give vitality to the statutory right to object in written representations and in Court. I have described the Communications Plan proposed by the Companies (as varied from time to time) in my previous judgments in this matter further to hearings on 27 October 2017 and 5 February 2018: see paragraph [17] above. For the reasons stated I approved the plan and also a guidance note, to be made available on Santander's ring-fencing microsite, to assist persons wishing to make representations at the Sanction Hearing.

20. The Companies also set up a number of processes to assist customers who wished to query or simply find out more about the proposed Scheme. In particular, they

established both: (a) a dedicated customer support team using existing facilities at Santander UK's corporate and commercial contact centre in Glasgow ("Glasgow Team"); and (b) a process for recording relevant communications ("Front Office Comms") from customers and counterparties of the wholesale banking and markets business of Santander UK's Global Corporate Banking division, and from relevant customers of the Retail Banking and Corporate and Commercial Banking divisions, made directly with relationship directors or other sales or trading personnel. (It has been operational since the Directions Hearing. Before that, staff at the centre had been trained to manage queries received about ring-fencing from September 2017.)

21. I was satisfied that the Companies have implemented the Communications Plan substantially in accordance with my February Order: any deviations have been minor and not such as adversely to affect persons concerned; and some additional communications and notifications have not cast doubt on nor detracted from the effectiveness of the Communications Plan. I was also satisfied that the Companies' further processes to support customers and answer their questions were appropriate and satisfactory in design and outcome.

22. I was supported in this conclusion both by the Skilled Person and by the Regulators. In summary, the Skilled Person has confirmed that he has been satisfied that the processes, controls and team in the dedicated Glasgow contact centre *"has worked effectively since its inception"*, and that *"all queries, concerns and ultimately objections from customers and other persons have been properly considered and have been or are being responded to*."

23. Having regard to the Skilled Person's careful review and assessment (including, in particular, in his Supplementary Report), the Regulators have confirmed that they too have been satisfied that the implementation of the Companies' RFTS Communication Plan meets the PRA's expectations regarding communicating the RFTS as set out in its statement of policy on ring-fencing transfer schemes.[2] The Regulators, who maintained a dialogue with the Skilled Person, who had fortnightly calls with the Companies' ring-fencing communications team to review management information detailing the volume and type of communications received, have also confirmed that they kept under review the Companies' processes for responding to queries, complaints and Written Statements, and that these have not given them any cause for concern. I address certain queries, representations and the small number of objections in a subsequent section of this judgment.

### *[D] Jurisdictional pre-conditions and their satisfaction*

24. Before a Court sanctions any RFTS it must be satisfied that certain requirements have been met, for their satisfaction is a pre-condition of the Court's exercise of jurisdiction. In outline these are that:

[2] See 3.13: "Transfers may have both positive and negative effects on persons other than the transferor. A key concern for the PRA will be to satisfy itself that persons other than the transferor have adequate information and a reasonable time within which to determine whether or not they are adversely affected and, if adversely affected, whether to make representations to the court. When reaching its view, the PRA will act in a way it considers most appropriate to advancing its own statutory objectives. The FCA also has a particular interest in the publication and notification of customers and the PRA will engage closely with the FCA on this."

(1) the scheme as proposed is a "ring-fencing transfer scheme" within the definition in section 106B FSMA;

(2) the applicants are entitled to apply for an order sanctioning the scheme (section 107(2), (2A)), the PRA consent to the application (section 107(2A)) and the application is made to the appropriate court (section 107(3));

(3) the application is accompanied by a scheme report prepared by an approved skilled person (section 109A);

(4) the Court has been satisfied that the appropriate certificates have been obtained: section 111(1) and (2)(ab); and that the transferee has, or will have before the scheme takes effect, 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: sections 111(1) and (2)(b); and

(5) the Court is satisfied that, in all the circumstances of the case, it is appropriate to sanction the scheme: section 111(1) and (3).

25. Most of these requirements have already been touched on; but the remainder of this judgment addresses them each in turn and in more detail.

*Definition of "Ring-Fencing Transfer Scheme"*

26. Section 106B FSMA defines a "ring-fencing transfer scheme" as follows:

> *"**106B Ring-fencing transfer scheme***
>
> *(1)A scheme is a ring-fencing transfer scheme if it—*
>
> *(a)is one under which the whole or part of the business carried on—*
>
> *(i) by a UK authorised person, or*
>
> *(ii) by a qualifying body,*
>
> *is to be transferred to another body ("the transferee"),*
>
> *(b)is to be made for one or more of the purposes mentioned in subsection (3), and*
>
> *(c)is not an excluded scheme or an insurance business transfer scheme.*
>
> *(2)"Qualifying body" means a body which—*
>
> *(a)is incorporated in the United Kingdom,*
>
> *(b)is a member of the group of a UK authorised person, and*

*(c)is not itself an authorised person.*

*(3)The purposes are—*

*(a)enabling a UK authorised person to carry on core activities as a ring-fenced body in compliance with the ring-fencing provisions;*

*(b)enabling the transferee to carry on core activities as a ring-fenced body in compliance with the ring-fencing provisions;*

*(c)making provision in connection with the implementation of proposals that would involve a body corporate whose group includes the body corporate to whose business the scheme relates becoming a ring-fenced body while one or more other members of its group are not ring-fenced bodies;*

*(d)making provision in connection with the implementation of proposals that would involve a body corporate whose group includes the transferee becoming a ring-fenced body while one or more other members of the transferee's group are not ring-fenced bodies.*

*(4) A scheme is an excluded scheme for the purpose of this section if-*

*(a) the body to whose business the scheme relates is a building society or credit union, or*

*(b) the scheme is a compromise or arrangement to which Part 27 of the Companies Act 2006 (mergers and divisions of public companies) applies.*

*(5) For the purposes of subsection (1)(a) it is immaterial whether or not the business to be transferred is carried on in the United Kingdom.*

*(6) 'UK authorised person' has the same meaning as in section 105.*

*...*

*(8) "The ring-fencing provisions" means ring-fencing rules and the duty imposed as a result of section 142G.*

27. The Santander Scheme satisfies the definition of a ring-fencing transfer scheme within the meaning of section 106B FSMA. Part of the businesses carried on by the Companies, each of them a UK authorised person within the meaning of section 105, i.e. a body incorporated in the UK with Part 4A permissions to carry on one or more regulated activities, is to be transferred to SLB, and in the case of ANTS, also to Santander UK.

28. The Scheme is for the "Scheme Purposes", being those set out in section 106B(3).

29. The Scheme is not an "excluded scheme" (within the meaning given to that term in section 106B(4)); nor is it an insurance business transfer scheme, so section 106B(1)(c) does not apply.

*Entitlement to apply to the High Court for an Order sanctioning the Scheme*

30. Section 107 FSMA provides the following:

> ***"107 Application for an order sanctioning transfer scheme***
>
> *(1) An application may be made to the court for an order sanctioning an insurance business transfer scheme, a banking business transfer scheme a reclaim fund business transfer scheme or a ring-fencing transfer scheme.*
>
> *(2) An application may be made by–*
>
> *(a) the transferor concerned];*
>
> *(b) the transferee; or*
>
> *(c) both*
>
> *(2A) An application relating to a ring-fencing transfer scheme may be made only with the consent of the PRA.*
>
> *(2B) In deciding whether to give consent, the PRA must have regard to the scheme report prepared under section 109A in relation to the ring-fencing transfer scheme.*
>
> *(3) The application must be made–*
>
> *(a) if the transferor concerned and the transferee are registered or have their head offices in the same jurisdiction, to the court in that jurisdiction;*
>
> *(b) if the transferor concerned and the transferee are registered or have their head offices in different jurisdictions, to the court in either jurisdiction;*
>
> *(c) if the transferee is not registered in the United Kingdom and does not have his head office there, to the court which has jurisdiction in relation to the transferor concerned.*
>
> *(4) "Court" means–*
>
> *(a) the High Court; or*
>
> *(b) in Scotland, the Court of Session.*

31. The Sanction Application satisfies the various requirements of section 107 FSMA; it was:

(a) made by both the Companies who are the transferors concerned in accordance with section 107(2)(a); and

(b) made with the consent of the PRA, which in giving its consent had regard to the Scheme Report in accordance with section 107(2A) and (2B).

32. The application was properly made to the High Court in accordance with s.107(3)(a) as the Companies are both registered in England and Wales.

*The Skilled Person and the Scheme Report*

33. Section 109A FSMA sets out the requirements concerning a scheme report for an RFTS. It provides:

> "***109A. Scheme reports: ring-fencing transfer schemes***
>
> *(1) An application under section 106B in respect of a ring-fencing transfer scheme must be accompanied by a report on the terms of the scheme (a "scheme report").*
>
> *(2) A scheme report may be made only by a person—*
>
> *(a) appearing to the PRA to have the skills necessary to enable the person to make a proper report, and*
> *(b) nominated or approved for the purpose by the PRA.*
>
> *(3) A scheme report must be made in a form approved by the PRA.*
>
> *(4) A scheme report must state—*
>
> *(a) whether persons other than the transferor concerned are likely to be adversely affected by the scheme, and*
> *(b) if so, whether the adverse effect is likely to be greater than is reasonably necessary in order to achieve whichever of the purposes mentioned in section 106B(3) is relevant.*
>
> *(5) The PRA must consult the FCA before—*
>
> *(a) nominating or approving a person under subsection (2)(b), or*
> *(b) approving a form under subsection (3).*

34. The requirement that a skilled person's report must state: (a) whether persons other than the transferors concerned are likely to be adversely affected by the scheme; and (b) if so, whether the adverse effect is likely to be greater than is reasonably necessary to achieve the relevant ring-fencing purposes under section 106B(3) (i.e. the Statutory Question) is peculiar to RFTSs.

35. That requirement has been satisfied. However, I return later to the detail of the Skilled Person's Scheme Report and his Supplementary Report.

*The Appropriate Certificates and the Authorisation of the Transferee*

36. Section 111 FSMA provides the Court with the power to sanction a ring-fencing transfer scheme. Insofar as material, that section provides as follows:

> "*(1) This section sets out the conditions which must be satisfied before the court may make an order under this section sanctioning a… ring-fencing transfer scheme*
>
> *(2) The Court must be satisfied that-*
> *…*
> *(ab) in the case of a ring-fencing transfer scheme, the appropriate certificates have been obtained (as to which see Part 2B of Schedule12])*
> *(b) the transferee has the authorisation required (if any) to enable the business, or part, which is to be transferred to be carried on in the place to which it is to be transferred (or will have it before the scheme takes effect).*
>
> *(3) The Court must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme.*

37. Accordingly, before sanctioning the relevant RFTS, the Court must be satisfied that the appropriate certificates have been obtained for the purposes of section 111(2)(ab).

38. Paragraph 9B of Part IIB, Schedule 12 FSMA defines the "appropriate certificates" for the purposes of section 111(2)(ab) FSMA. Paragraph 9B provides as follows:

> *"(1) For the purposes of section 111(2) the appropriate certificates, in relation to a ring-fencing transfer scheme, are—*
>
> *(a) a certificate given by the PRA certifying its approval of the application,*
>
> *(b) a certificate under paragraph 9C, and*
>
> *(c) if sub-paragraph 2 applies, a certificate under paragraph 9D*
>
> *(2) This sub-paragraph (2) applies if the transferee is an EEA firm falling within paragraph 5(a) or (b) of Schedule 3."*

39. Paragraph 9C of Part IIB, Schedule 12 provides for the provision by a "relevant authority" of a certificate as to financial resources (CFR) as follows:

> *"(1) A certificate under this paragraph is one given by the relevant authority and certifying that, taking the proposed transfer into account,*

*the transferee possesses, or will possess before the scheme takes effect, adequate financial resources.*

*(2) "Relevant authority" means—*

*(a) if the transferee is a PRA-authorised person with a Part 4A permission or with permission under Schedule 4, the PRA;*

*(b) if the transferee is an EEA firm falling within paragraph 5(a) or (b) of Schedule 3, its home state regulator*

*…"*

That CFR has been provided: see paragraph 17(9) above.

40. Paragraph 5(b) of Schedule 3 provides:

*"'EEA firm' means any of the following if it does not have its relevant office [i.e. head office] in the United Kingdom-*

*(b) a credit institution (as defined in Article 4(1)(1) of the capital requirements regulation) which is authorised (within the meaning of Article 8 of the capital requirements directive) by its home state regulator;"*

41. Paragraph 9D provides for a certificate that the home state regulator of the transferee has been notified as follows:

*"A certificate under this paragraph is one given by the appropriate regulator and certifying that the home state regulator of the transferee has been notified of the proposed scheme and that-*
*(a) the home state regulator has responded to the notification, or*
*(b) the period of 3 months beginning with the notification has elapsed."*

42. The "appropriate certificates" have been obtained by the Companies:

(a) The PRA has certified its approval of the application for sanction.

(b) The PRA has given Santander UK a CFR. The PRA is the "relevant authority" to give the certificate, as Santander UK is a PRA-authorised person with a Part 4A permission.

(c) The European Central Bank ("ECB") has given Banco Santander a CFR. The ECB is the "relevant authority" to give the certificate, as it is the home state regulator of Banco Santander, which is an EEA firm falling within paragraph 5(b) of Schedule 3 FSMA.

(d) The PRA has given a certificate under paragraph 9D certifying that the ECB, as home state regulator of Banco Santander, was notified of the Scheme on 6 February 2018 and the ECB responded to the notification, without comments, on the same date.

43. The Court must also be satisfied of a further condition, namely that the two transferees, Santander UK and SLB, have the authorisations required, or will have it before the Scheme takes effect, to enable the business which is to be transferred to each of them to be carried on in the place to which it is to be transferred: section 111(2)(b). As to this:

(1) Santander UK is authorised by the PRA under Part 4A FSMA, having permission to carry on certain regulated activities;

(2) Subject to the question as to the future effect of the UK's withdrawal from the EU which I discuss at some length at paragraphs 123 to 143 below, as at the date of the Sanction Hearing it was clear that SLB has validly exercised its passporting rights in the UK pursuant to Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms. The exercise of such rights at the date of the Sanction hearing and presently are such as to permit SLB to carry on (and provide the necessary authorisation in respect of) the business to be transferred under the Scheme.

44. The passported permissions of SLB, as listed on the Financial Services Register, extend to a broad range of banking and investment services and activities covered by the Banking Consolidation Directive and Markets in Financial Instruments Directive. Santander's ring-fencing programme has undertaken due diligence to validate that the passported permissions of SLB are sufficiently broad to encompass the business being transferred to it under the Scheme. Accordingly, SLB, as well as Santander UK, has all regulatory authorisations and permissions required to conduct its business, including the business to be transferred to it under the Scheme.

45. The Regulators have recognised this, as in effect they acknowledged this by their support for the sanction of the Scheme, appearing by counsel at the Sanction Hearing to do so. Further, and as previously noted, the PRA consented to the Sanction Application on 18 January 2018 and on 5 June 2018 certified its approval of the Sanction Application.

## *[E] Court's role and discretion*

46. As will already be apparent, an RFTS can have no effect unless and until sanctioned by the Court. The Court must be satisfied that, in all the circumstances of the case, it is appropriate to sanction the scheme: section 111(1) and (3) FSMA.

47. The role of the Court, its power to sanction an RFTS, and its proper approach to the exercise of its discretion have been considered in detail in previous applications.

48. As I noted in my judgment in the *Lloyds Scheme* [2018] EWHC 1034 (Ch) at paragraphs 145 to 149, although they are all part of the same Part of FSMA and have certain features in common, there are important differences between an RFTS and other forms of scheme under Part VII FSMA. Mr Moore summarised these as follows:

(1) Ring-fencing is mandatory and, practically, can only be effected by a court-sanctioned RFTS. Ring-fencing has been put in place to effect a re-structuring of the major UK banks which is of unprecedented scale and of national importance. The Companies have expended significant resources in putting together a scheme designed to comply with the legislative framework.

(2) The deadline for implementation of ring-fencing was 1 January 2019.

(3) The statutory regime has required the input of a skilled person who has been required to answer the Statutory Question in s.109A(4).

49. In paragraphs 44 and 45 of his judgment in the *Barclays Scheme* [2018] EWHC 472 (Ch) Sir Geoffrey Vos CHC recognised these differences and identified the following matters that must be considered in assessing an RFTS:

(1) The Court must consider that the RFTS is one, which in all the circumstances of the case it is appropriate to sanction. In doing so it must give due recognition to:

a) the mandatory nature of the process;

b) the scale and importance of the process;

c) the time within which it must be achieved; and

d) the commercial judgment entrusted to the directors of the applicant companies and the performance of their duties under Companies Act 2006 in the design of the RFTS.

(2) Essentially, the question is whether any person is likely to be materially adversely affected by the RFTS and, if so, whether that is more than is reasonably necessary to achieve the ring-fencing purposes in relation to which question the Court will again give due regard to the commercial judgment and duties of directors putting forward the RFTS.

(3) In assessing that question the Court will pay close regard to the views of the Skilled Person, whose conclusions will, in the absence of evidence that there is a material omission or error in his approach, ordinarily be the most important element in the Court's decision.

(4) The Court will also pay close attention to any views that the Regulators may express not only by reason of the development of general regulatory guidelines

for RFTSs in general but also their close involvement in the development of any RFTS in particular.

(5) The Court will pay close attention to the written statements of representations which objectors wish the Court to consider and any oral submissions made, as well as to the general feedback in relation to the RFTS that the Companies have received.

(6) It is not for the Court to produce what in its, or an objector's, view is the best possible RFTS. As between different designs, none of which leave a person or persons materially adversely affected, or no more so than is reasonably necessary to achieve the ring-fencing purposes, the choice is for the promoters of the RFTS to make.

50. At paragraph 100 of the same judgment, the Chancellor summarised the factors which, in addition to the above, he considered relevant to the exercise of the Court's discretion:

> **"**It seems to me, therefore, taking into account the authorities and the submissions that I have mentioned, that in exercising its discretion, the court must keep in mind, in addition to the contextual and other matters I have already mentioned the following:
>
> i) The court's discretion is unfettered and genuine and is not exercised by way of a rubber stamp.
>
> ii) The design of a ring-fencing transfer scheme is a matter for the board of the bank concerned. There may be many possible approaches to the design of a statutorily-compliant ring-fencing transfer scheme that will affect stakeholders differently. The choice is for the directors of the bank concerned, acting properly in accordance with their duty under section 172(1) of the Companies Act 2006 (which is to act in the way they consider, in good faith, would be most likely to promote the success of the company having regard to matters, including those specified in that subsection).
>
> iii) The adverse effects of a ring-fencing transfer scheme must be viewed through the lens of the statutory question, so that the court must consider, with the aid of the Skilled Person, first whether persons other than the transferor are likely to be adversely affected by the scheme, and, if so, whether the adverse effect is likely to be greater than is reasonably necessary in order to achieve the statutory purposes. In considering whether persons are likely to be adversely affected by the scheme, regard need only be had to those adverse effects

> that are (i) possibilities that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case, (ii) a consequence of the scheme, and (iii) material in the sense that there is a prospect of real or significant, as opposed to fanciful or insignificant, risk to the position of the stakeholder concerned.
>
> iv) Even if the statutory question is answered negatively, it will not automatically follow that a proposed scheme will be rejected. The court's approach will depend on all the circumstances, including the balance between the chosen design of the scheme, the benefits that will be achieved by the scheme, and the nature of the adverse effects identified, all viewed through the lens of the approach inherent in the statutory question itself.
>
> v) The court will give weight to the views expressed to it by the Skilled Person and by the Regulators, and will fairly evaluate the weight to be given to views expressed to it in statements of representation made by stakeholders."

51. As I sought to emphasise in paragraph 231 of my judgment in the *Lloyds Scheme* the Court's role is not to wonder about improvements to the Scheme, but to determine whether or not to sanction it, having regard to the answers to the Statutory Question, and the Court's appreciation of the overall consistency and fairness of what is proposed:

> "In guiding its approach, the Regulators' input and appearance is of crucial assistance; yet if anything the ultimate guide or litmus test is to be provided by the Skilled Person, and the Court's assessment of any particular objections put forward at the hearing." (paragraph 233)

52. I also expanded on the Chancellor's observations at paragraph 100(ii) of *Barclays No 5* [2018] EWHC 472 (Ch), adding (at paragraph 156) that:

> "…when the second part of the Statutory Question is being addressed, the question is not whether any adverse effect is greater than is reasonably necessary given the constraints of the particular scheme design, but whether that adverse effect is such as to be greater than reasonably necessary in order to achieve the statutory purpose. If the adverse effect appears material, and it appears likely that another scheme design would have avoided the adverse effect, that may call in question the scheme design chosen…"

## *[F] Basic design of the Santander Scheme*

53. There are two basic approaches to structuring a ring-fencing transfer scheme for banking groups that are required to ring-fence their core activities under Part 9B of FSMA. First, core activities can only be transferred to an RFB leaving the transferor to conduct all other activities, including excluded activities and prohibited business. Alternatively, the excluded activities and prohibited business can be transferred to another entity, leaving the transferor to carry on all other activities, including core activities as an RFB. (In theory, there are two further ways of structuring ring-fencing, but they are not practical: (i) a bank could run off its excluded activities and prohibited business to become an RFB; or (ii) two new banks could be created, an RFB and a NRFB.)

54. Broadly speaking, Santander has chosen the second of these approaches, sometimes referred to as a "wide RFB model" (as did the Lloyds Group, whereas Barclays and HSBC chose the first). Santander UK will become the Santander UK Group's main RFB in the UK. CAL will also be an RFB within the Santander UK Group. As previously indicated, SLB as the transferee from ANTS of prohibited (as well as certain specified permitted business) will not be a NRFB, and ANTS will be emptied of all material assets (save for a small part of residual business held until its maturity).

55. Thus, the Scheme provides for three types of business transfers[3].

(1) Prohibited business and specified permitted business of Santander UK to SLB ("Santander UK Prohibited Business").

(2) Prohibited business and specified permitted business of ANTS to SLB ("ANTS Prohibited Business").

(3) Permitted business of ANTS to Santander UK ("ANTS Permitted Business").

56. There are expected to be transactions, products and arrangements with up to 1,182 customers (although only about 697 customers with live transactions) that may be transferred under the Scheme, most of whom will be large corporate customers, financial institutions or market counterparties. The customers who are not counted as having live transactions are mostly customers with master agreements with ANTS under which there are no live trades.

57. In more detail:

(1) Santander UK will become the Santander UK Group's primary RFB in the UK, and will be the holding company of an RFB sub-group (the "RFB sub-group"). It will serve all Santander's personal customers in the UK and the vast majority of its business and corporate and commercial customers. Santander UK will also broadly continue, to the extent allowed by the legislation, to hold

[3] Some customers have more than one of these three types of transferring business, hence the expected numbers of customers in each category add up to more than the total maximum number of transferring customers and counterparties.

and serve Santander's corporate banking business in the UK. It will continue to be a subsidiary of UK HoldCo.

(2) The effect of the Companies' chosen ring-fencing model ("the Chosen Model", as further explained in paragraphs [27] and [28] below) is that all business in Santander UK that is RFB mandated business (i.e. which can only be conducted by an RFB) will stay in Santander UK as will the majority of its RFB permitted business. This includes the vast majority of the business conducted by the Santander UK Group, comprising about 16.5 million non-dormant customers.

(3) The RFB sub-group will include the subsidiaries set out at paragraph 74 of the first witness statement of Mr Antonio Roman, Executive Director and Chief Financial Officer of Santander UK plc, dated 29 January 2018 ("Roman 1"), and as set out in the post-implementation structure chart at 5.4 of the Scheme Report, with the addition of a further subsidiary, PSA UK Number 1 plc (a joint venture non-trading company which should have been included in the original list). As part of the wider restructuring, following the Scheme Santander UK will transfer its shares in ANTS to UK HoldCo so that ANTS will become a sister subsidiary of Santander UK, outside the RFB sub-group.

(4) CAL will continue to be a subsidiary of Santander UK and will also be an RFB within the Santander UK Group.

(5) Neither Santander UK nor CAL will conduct RFB prohibited business from 23 July 2018.

(6) Certain special purpose vehicles used for securitisation programmes and transactions, and the Abbey covered bond programme will be conducted within the RFB sub-group.

(7) Most of the products Santander UK will be prohibited from offering, or customers it will be prohibited from serving, will be provided or served by the wider Santander Group, mostly by Banco Santander through SLB, its London branch.

(8) Santander UK will therefore cease, before 1 January 2019, to carry on activities that would constitute or give rise to an excluded activity or a prohibited financial institution exposure, as will its subsidiaries. The RFB sub-group will comprise entities undertaking or associated with the retail, business and corporate banking businesses of the Santander UK Group. Santander UK and ANTS will transfer activities that would constitute or give rise to an excluded activity or a prohibited financial institution exposure under the FSMA (Excluded Activities and Prohibitions) Order 2014 (the "EAPO").

(9) As noted above, ANTS will be emptied of all material assets. Following implementation of the RFTS, it is expected that only a small, residual portion of business will remain in ANTS ("ANTS Retained Business"). The prohibited business of ANTS (save for the ANTS Retained Business) will transfer to SLB. The majority of the permitted business of ANTS will transfer to Santander UK, with the balance of the permitted business of ANTS transferring to SLB.

58. The main feature of the design chosen is that Santander UK's retail and small business customers will not transfer but will continue to be serviced out of the retail division of Santander UK. Santander UK will also, to the extent allowed by the ring-fencing legislation, continue to conduct Santander's corporate banking business in the UK.

### *[G] Rationale for design of the Santander Scheme*

59. Accordingly, the Santander Scheme involves the transfer to either SLB or Santander UK (as relevant) of only a relatively small number of up to about 697 corporate, and largely sophisticated, customers and market counterparties with live transactions, and a further 485 who have master agreements transferring under which there are no live trades. Thus, the scheme design should (and is expected to) bring only limited disruption to Santander UK customers, in particular the retail and smaller corporate customers.

60. In that respect, the overall design of the Santander Scheme is similar to the Lloyds RFTS: it also involves the transfer of excluded activities and prohibited business to permit a transferor (in this case Santander UK) to operate as an RFB.

61. However, there are important differences between the Santander Scheme and the Lloyds RFTS. In particular, whereas in the Lloyds RFTS, the transferee is a newly created English bank regulated in this jurisdiction, in the Santander Scheme, the transferee of the non-ring-fenced business (SLB) is the London branch of a non-UK entity. SLB is subject to regulation by the Regulators but its direct prudential supervisory regulation is also that of Banco Santander, which is a bank registered in Spain and is subject to prudential supervision by the joint supervisory team comprising the ECB and the Bank of Spain. SLB's ability to offer certain products and services in the UK depends on 'passporting'. Passporting enables an EEA-authorised firm such as Banco Santander to provide financial products or services, set up a base, or run its permitted activities in another country in the European Economic Area (EEA). This raised issues of some importance and concern in the context of Brexit, as I discuss later; but it is convenient first to explain how the scheme design was decided upon.

62. It appears from Roman 1, which was originally filed when the Companies sought directions in respect of this matter ("the Directions Hearing"), that the "wide RFB Model" was not Santander's initial choice. It was initially decided, in early 2016, to adopt a narrow RFB/wide NRFB model, where as narrow a range of products and services as possible would be included in the RFB. Both the RFB and the NRFB would sit under UK HoldCo.

63. However, in late 2016 and following the UK vote to leave the European Union, it was decided to adopt the present design of a wide RFB, with a narrow portion of Santander UK's business being transferred to SLB, with a long-term objective of establishing a NRFB in the UK.

64. The Companies' rationale for ultimately selecting for implementation this Chosen Model is set out in paragraph 70 of Roman 1 as follows:

> "The Chosen Model required relatively few changes to the Santander UK Group in the context of a programme of the scale of ring-fencing and will bring relatively limited disruption to Santander UK customers and, in particular, retail and smaller corporate customers. In particular, Santander UK expects that the Chosen Model will:
>
> (a) provide Santander UK's retail and corporate customers with a banking service that is simple, personal and fair by building on the existing strengths of Santander UK's retail, wealth management, business and corporate banking business lines;
>
> (b) minimise the impact on retail and corporate customers by keeping their products and services within Santander UK … …
>
> (c) provide a referral model that is as efficient and effective as possible, with those corporate customers banked by Santander UK being able to access products offered through SLB in circumstances where their needs cannot be met through a product offered from Santander UK … …
>
> (d) … reduce the customer and stakeholder impact of ring-fencing implementation."

65. As I elaborate later when dealing in more detail with his report, the Skilled Person has concluded that the present design provides the Santander UK Group with the most appropriate solution to achieve its objectives. Suffice it for the present to say that (as Ms Eborall put it in her oral submissions on behalf of the Skilled Person on day 2 of the Sanction Hearing) the Skilled Person was persuaded that the "original ring-fencing plan was not going to fly", principally because there were doubts over the viability of a UK NRFB: of insufficient size and capitalisation, it would not have had the benefit of the Santander UK cross-guarantee, and the cost of a replacement would have been prohibitive, and in consequence the NRBS's credit rating would have been a source of real concern, and probably unsatisfactory.

### *[H] The Statutory Question and the role of the Skilled Person*

66. It will already be apparent that the Skilled Person's report is a key document in enabling a proper assessment of an RFTS.

67. Its primary purpose is to answer the Statutory Question. The Statutory Question is in two parts, and cast in terms that recognise that the compulsory regime may cause adverse effects, so that a skilled, independent assessment is therefore required as to whether such effects are greater than reasonably necessary for the purpose of achieving the statutory purpose.

*Structure of the Scheme Report*

68. Mr Cole's Scheme Report is a detailed document running to over 400 pages (including Appendices).[4]

69. In his Scheme Report Mr Cole has:

(1) reviewed Santander's overall Ring-Fencing Plan to understand the Scheme design in its context, and Santander's approach, rationale and changes required to meet the ring-fencing legislation;

(2) categorised persons into groups with homogenous characteristics;

(3) reviewed the changes on groups of persons as a consequence of the Scheme;

(4) considered any likely adverse effect on those groups of persons (other than Santander UK and ANTS, as transferors);

(5) considered whether there were any mitigations that Santander could take and/or any alternative arrangements to the change that would meet the ring-fencing requirement to restrict or alleviate the adverse effect; and

(6) considered whether any adverse effects on any group of persons is likely to be greater than reasonably necessary.

70. Mr Cole also described his understanding and interpretation of the assessment criteria and terminology used in the statutory formulation of the Statutory Question as follows:

(1) *"likely"* effects are described not only as those which are "almost certain to happen or are expected to happen" but also those which are a "realistic possibility which could not be disregarded in the Scheme Report".

(2) *"adversely affected" / "adverse effect":* in determining whether an effect is likely to be adverse, the Skilled Person has considered that "any effect that would put that group of persons in a worse position than if the Scheme were not to take place" should be regarded as an adverse effect. The Skilled Person further explains that:

[4] Although a summary of the Scheme Report was approved by the Skilled Person and also published on the website.

> "…I have maintained a deliberately broad scope of what constitutes an adverse effect and have not limited this in any way by applying threshold or values."
>
> "In considering whether an effect would be an adverse effect…I have taken into account whether any actions required to be taken by those persons to accommodate the change are such that could be reasonably regarded as part of normal business activity (e.g. an administrative update to a business address, that happens from time to time). In doing so, I have had regard to the relative size and sophistication of the affected persons when considering the nature of change that they would need to undertake."
>
> Where I have determined, based on my professional judgement, that the actions are reasonable for the affected group of persons without incremental costs, I have concluded that the effect of the change is not adverse."

(3) *"necessity"*: the Skilled Person explains that he has assessed the necessity for the change against each of the following types of change:

> ► From legislation, with no choice or discretion allowed;
>
> ► From legislation but with the ability for the Ring-Fencing Programme to apply some degree of influence or choice as to how it is implemented; and
>
> ► Not required by legislation specifically, hence is a feature of the Ring-Fencing Plan's design."

71. Further, in assessing part (b) of the Statutory Question and the issue of whether an adverse effect is likely to be no more than *"reasonably necessary"*, the Skilled Person has considered whether it would be possible to reduce such effects by: (1) Santander effecting mitigating actions; (2) to the extent that the effects arise at least partly as a consequence of the Scheme design, alternative design options or alternative solutions; and (3) the affected group of persons carrying out mitigating actions.

72. The Skilled Person's approach in these respects is consistent with the Court's earlier judgments in the *Barclays Scheme* (see paragraph 100(iii)) and the *Lloyds Scheme* (see paragraphs 162 to 164) even though there are certain differences between them. I accept that such differences are: (a) inevitable (as the Chancellor noted in the context of the *HSBC Scheme* [2018] EWHC 1385 (Ch) at paragraph 31); (b) permissible; and (c) not such as to undermine any of the earlier or this Skilled Person's reports. I accept that although Mr Cole's approach differs from that of the other skilled persons (and each of those from each other), it is no less rigorous or appropriate. I have been quite satisfied that he has addressed the Statutory Question in a meticulous manner that complies with the legislation and applicable principles.

*Scheme Report in more detail*

73. The Scheme Report is split into seven parts, as follows:

    (1) Part 1 contains the Skilled Person's introduction, summary of conclusions and background to his report.

    (2) Parts 2 to 4 set out the Skilled Person's findings and conclusions:

        a) Part 2, paragraphs 8 to 15 sets out the Skilled Person's findings and conclusions on changes at an entity level, which will affect all persons. Although the Skilled Person has identified a number of changes, he considers none to have an adverse effect.

        b) Part 3, paragraphs 16 to 26, addresses effects on each group of customers identified. The Skilled Person has identified some adverse effects on particular groups of customers, which are summarised further below.

        c) Part 4, paragraphs 27 to 34, considers changes to all other groups of persons, in respect of which there are two changes with adverse effects which are mitigated (employee redundancies and pension scheme contributions), and three adverse effects (on market counterparties) not mitigated.

    (3) Part 5 identifies changes not considered in Mr Cole's original Scheme Report, and in particular those effected under the Crown Dependency Schemes, because those schemes are not part of the Santander Scheme itself. However, he has subsequently considered the impact of the Scheme on customers of, and other persons connected to, Santander's UK Jersey and Isle of Man branches of the Crown Dependencies in his Supplementary Report.;

    (4) Part 6 contains the Skilled Person's declaration; and

    (5) Part 7 contains the appendices.

*Cohorts for whom there are no changes or adverse effects identified*

74. Mr Cole has concluded that there are no changes for: the 24 million Santander UK Group Retail Banking Customers; the Santander UK Group SME Customers; nor the Santander UK Corporate Customers (non-SME) holding permitted products only.

75. ANTS SME Customers will be subject to two changes: to customer documentation and Standard Settlement Instructions, but neither should occasion any adverse effects.

76. There are a number of other changes, with no identified adverse effects, affecting certain ANTS corporate customers who hold permitted products only. As to other groups of persons, there are either no changes, or no changes with adverse effects, upon: retail and small business banking employees; landlords and suppliers; bondholders and debtholders; beneficiaries of guarantees, letters of credit or performance bonds of Santander UK and ANTS; shareholders; and Government and other fiscal persons.

*Cohorts who are, or may be, adversely affected by the Santander Scheme*

77. In his Scheme Report, Mr Cole identified the following cohorts of customers who are, or may be, adversely affected by the Santander Scheme:

(1) ANTS Corporate Customers (non-SME) holding permitted products only as a consequence of the ANTS to Santander UK business transfer;

(2) Santander UK Corporate Customers (non-SME) holding permitted and prohibited products as a consequence of the Santander UK to SLB UK business transfer;

(3) ANTS Corporate Customers (non-SME) holding permitted and prohibited products as a consequence of both the ANTS to Santander UK and ANTS to SLB business transfers;

(4) Santander UK and ANTS Specified Corporate Customers as a consequence of both the ANTS to Santander UK and ANTS to SLB business transfers;

(5) Santander UK and ANTS Relevant Financial Institutions ("RFIs") as a consequence of both the ANTS to Santander UK and ANTS to SLB business transfers;

(6) Exempt Financial Institutions (EFIs) of ANTS as a consequence of both the ANTS to Santander UK and ANTS to SLB business transfers; and

(7) one ANTS customer with a product that will remain in ANTS until its maturity, as a result of the unwinding of the cross-guarantee between ANTS and Santander UK: see paragraph 26.

78. In summary, the adverse effects identified in the Scheme Report were the following:

(1) *Changes to rights of set-off:* (a) Where loans are transferred from ANTS to Santander UK, and the customer also has an existing deposit with Santander UK, Santander UK will be able to set off unsecured loan or derivative amounts against the deposit; and (b) customers whose prohibited derivatives are transferred to SLB will not in certain cases be able to set off against unsecured loans retained or transferred to Santander UK.

(2) *Changes to netting sets:* Where prohibited derivatives are transferred to SLB but permitted derivatives are retained by Santander UK netting sets within a Santander UK Credit Support Annex will be broken. There will be a similar effect where permitted and prohibited derivatives are transferred out of ANTS to both Santander UK and SLB.

(3) *Capital valuation adjustment ("KVA") and Credit Valuation Adjustment ("CVA"):* there *may* be an adverse effect (or there may be a positive effect) upon the KVA and/or CVA calculations (that corporate customers are required to undertake to ensure that counterparty credit risk is taken into account on their balance sheets) as a consequence of the lower credit rating of Banco Santander (and therefore SLB) to Santander UK and ANTS for those customers transferring from Santander UK and ANTS to SLB. The effect is difficult to assess as calculation methods are determined by the customer, and

credit rating is only one relevant consideration. Further, Mr Cole noted that the subsequent upgrade of one notch in Banco Santander's credit rating by Standard & Poor and Moody's has narrowed the difference in ratings between Santander UK/ANTS and Banco Santander. In S&P's case it is now the same. This may reduce the risk of the adverse effects relating to CVA and KVA calculations from materialising.

(4) *Ratings triggers*: there is an adverse effect for RFIs transferring to SLB also caused by the lower credit rating of Banco Santander (and therefore SLB), which is that customers with swaps that have ratings triggers embedded in their swap documentation may trigger a requirement for that customer to provide additional capital or even terminate the agreement. But this adverse effect is mitigated by SLB providing any additional collateral and planning to override any events of default that might cause early termination. Further, default clauses will be overridden by the Scheme. Mr Cole has concluded that the mitigation offered will adequately mitigate the adverse effect.

(5) *Differences in the derivatives valuations service*: similarly, there *may* be an adverse effect (or there may be a positive effect) upon the valuation of derivative positions for corporate customers transferring from Santander UK and ANTS to SLB because SLB uses a different discount curve in its derivative valuation service.

(6) *Loss of downstream guarantees:* one ANTS customer which remains in ANTS and which holds a total return swap (pursuant to which ANTS may pay the market counterparty dependent upon the value of certain securities) will be adversely affected by the loss of the cross-guarantee currently provided between Santander UK and ANTS (in addition to the loss of credit rating by ANTS). However, that customer has been in bilateral discussions with Santander and has agreed an acceptable mitigation.

(7) *Santander UK Group employees in the UK*: There are three employees who went through a redundancy consultation process. Two have accepted other roles in the Santander UK Group. The third has been made redundant. Mr Cole concluded that everything reasonable had been done, the change was a necessary consequence of the Scheme and the adverse effect is not greater than reasonably necessary to achieve the purposes of the Scheme.

(8) *Santander UK Group Pension Scheme members*: At the time of the Scheme Report, it was thought that 11 members of Santander UK Group Pension Scheme will be transferring to Banco Santander and will therefore become deferred members of that pension scheme. It has changed to 10 for reasons explained in Mr Cole's Supplementary Report. The Santander UK Group is taking mitigation steps. Mr Cole has concluded that the adverse effect has been satisfactorily mitigated and the adverse effect is not greater than reasonably necessary to achieve the purposes of the Santander Scheme.

(9) *Adverse effects on cohorts of market counterparties:* as with some customers, in his Scheme Report, the Skilled Person has identified that certain market counterparties transferring from ANTS to Santander UK and from ANTS to SLB would be adversely affected, only in the event that either Santander UK

or SLB defaulted, by the inability to set-off any early termination amount ("ETA") owed or due under the prohibited derivatives held in SLB against any ETA owed or due under the permitted derivatives that remain held in, or transferred to. Santander UK. After considering alternatives, the Skilled Person concluded that no reasonable alternatives are available, but that the effect is not greater than reasonably necessary to achieve the Scheme's statutory purposes. Market counterparties transferring from ANTS to SLB are also (potentially) adversely affected by the lower credit rating of Banco Santander (and therefore SLB) which could require them to hold more regulatory capital against the transaction.

79. In this case, the Skilled Person has provided, in addition to a Scheme Report, a Supplemental Report, the purpose of which is to confirm his conclusions taking into account changes to the Scheme, any issues arising in the implementation of the Ring-Fencing Plan, developments in the context of the UK's decision to withdraw from the European Union, and other changes in circumstances. Unless otherwise stated or clear from the context, references in this judgment to the Scheme Report should be taken to be references to both the Scheme Report and the Supplemental Report.

80. Given the central importance of the Scheme Report, I return later to its detailed assessments, both when discussing the implications of Brexit and in a separate section, section [M] below. Further, I note certain conclusions of the Skilled Person in the more detailed description of the Santander Scheme which next follows.

### *[I] Principal features of the Santander Scheme*

81. I take the following description of the principal features of the Santander Scheme from the clear and useful summary contained in the skeleton argument of the Companies prepared by Mr Martin Moore QC and Mr Stephen Horan (which I confirm I have checked against the Scheme itself, using it as a guide, and with the assistance of Counsel's further submissions at the various hearings).

82. Before addressing in turn each of the three business transfers provided for, and particular features or provisions of note, it is convenient to describe the architecture of the Santander Scheme by reference to its Clauses as follows:

(1) As was the case in each of the three previous schemes sanctioned by this Court, an understanding, and much of the operation, of the Santander Scheme requires careful appreciation of the extensive and intricately related definitions which are set out in Schedule 1.

(2) An example of the care required is provided by the definitions of "ANTS Prohibited Business" and "Santander UK Prohibited Business" which: (a) include some specified permitted business which is to be transferred though such transfer is not statutorily required and which a quick reference to the defined terms might suggest was not indeed being transferred; and (b) do not include specifically Retained Business (as defined in the case of each of ANTS and Santander), nor the Non-EEA Business of either of ANTS or Santander.

(3) These inclusions and carve-outs are also exemplified and effected in Clause 3.5 of the Santander Scheme which expressly provides that there will not be transferred:

(a) any of the ANTS Retained Business or ANTS Non-EEA Business to Santander UK or SLB;

(b) any of the Santander UK Retained Business to SLB or ANTS; or

(c) any of the Santander UK Non-EEA Business to ANTS.

(4) There are intricate definitions of "Effective Dates", as well as a provision for subsequent transfers of "Residual Assets" and "Residual Liabilities", being (in very broad terms) assets and liabilities the transfer of which may be subject to some impediment or undesired consequence.

(5) There are provisions for the unwinding of certain Cross-Guarantees (Clause 4).

(6) Clause 7 makes extensive provision for the transfer and preservation of security interests so that customer or counterparties, or the relevant transferee, as the case may be, can have the same rights of enforcement as if the relevant encumbrance had always been held by, vested in or enforceable by the relevant customer or counterparty, or transferee, as the case may be.

(7) There is a concept of "Hybrid Customer" which is a customer or counterparty whose products, transactions or arrangements straddle permitted and prohibited business, such that some business relating to that customer is being transferred or (if in Santander UK) retained separately under the Scheme. The concept is most relevant for shared security, referred to as "Hybrid Customer Relevant Encumbrances". Clause 9 makes provision for the transfer of these.

(8) Clause 8 appoints Santander UK as the security trustee for Hybrid Customer Relevant Encumbrances (or any Relevant Security Agreement constituting one) for the benefit of the parties who will share the security. These parties may include Santander UK, ANTS and SLB, as well as any person expressed in the relevant security instrument to be a secured party in respect of whom Santander UK or ANTS (as applicable) had been acting as security trustee or agent immediately before the applicable Effective Date. It also includes any RFB sub-group member owed liabilities in respect of any Hybrid Customer Relevant Interest. The rights and obligations in the Relevant Security Agreements of Hybrid Customers are dealt with in Clause 10.

(9) Clause 6 provides at length for the relevant transferee to be treated for contractual purposes in respect of transferring contracts, obligations and arrangements as though it were the relevant transferor. Clause 14 reinforces the efficacy of this transfer by deploying the broad powers of transfer available under Part VII FSMA transfer schemes to remove any impediments from the Companies' capacity to transfer, dealing as it does with the consequences of the Scheme and the transfers made under it. For example, it suspends any events of default and

termination events to the extent that they would otherwise be triggered by the Scheme.

(10) Clauses 19.3 and 19.6 to 19.10, and related provisions in Schedule 12, make certain changes to existing contracts, agreements and other documentation of Santander UK and ANTS where such changes are required or desirable as a result of the effects of the Scheme. For example, the Scheme updates references to Santander UK or ANTS (as applicable) in agreements that transfer under the Scheme, and related notice and similar provisions. It also removes references to the Cross-Guarantees if they appear in any existing documents to which Santander UK or ANTS is a party.

(11) There are also the usual provisions relating to books and records (Clause 16), continuity of proceedings (Clause 15) and data protection (Clause 18) in respect of any transferring business to permit the relevant transferee to continue to conduct the Relevant Transferring Business as if it had been the relevant transferor.

(12) There is a "wrong pockets" clause at Clause 22 which provides for corrective steps to be taken where at any time after the Final Effective Date and before 1 January 2019, ANTS, Santander UK or SLB becomes aware that one of the parties holds specified business that it is not intended to hold under the Scheme. The clause provides that the relevant party take steps as soon as reasonably practicable and no later than 31 December 2018, to transfer that wrongly held business.

(13) There is provision in Clause 25 for the Scheme to be modified. Where this is sought to be done after the Scheme has been sanctioned, Clause 25.2 provides that this must be done with the consent of the Court. There is an exception to this, as set out in Clause 25.5, in the case of any minor or technical amendments to the terms of Scheme or any amendment to correct any manifest error in its terms, in which case the amendment can be made if the FCA and PRA have been notified of it and neither has objected within 14 days.

(14) Clause 25.3 makes provision for the FCA and PRA, as well as persons wishing to allege they would be adversely affected by the carrying out of the Scheme, to have the right to be heard by the Court in relation to any amendment brought to the Court under clause 25.2. Where section 107 FSMA requires the consent of the PRA for any application to the Court, the consent of the PRA shall be obtained.

(15) The Scheme is governed by and construed in accordance with English law with exclusive jurisdiction of the courts of England: Clause 23.

83. I turn to elaborate on various particular matters incidental to the three sets of transfers.

(*1*) *Prohibited business and specified permitted business of Santander UK to SLB*

84. There are expected to be 52 customers and counterparties (including market counterparties) of Santander UK who have products, transactions or arrangements expected to be transferred to SLB under the Scheme, unless they have terminated or

transferred beforehand: paragraph 73 of Mr Roman's 3rd witness statement ("Roman 3"). The relevant Effective Date is 23 July 2018.

85. Santander UK will transfer to SLB, to the extent that it does not constitute Santander UK Retained Business, Santander UK's business, assets and liabilities in respect of:

(a) products transactions and arrangements with organisations (such as other financial institutions) that would constitute or give rise to an "excluded activity" or a prohibited "financial institution exposure" for Santander UK under the EAPO, principally derivatives and securities finance transactions with RFIs that are not linked to hedging or management of Santander UK's balance sheet risks or liquidity or collateral requirements, prohibited forms of derivatives with corporates and loans, trade finance and other credit facilities made to entities that are RFIs;

(b) investments held by Santander UK where dealing in such investments would constitute an excluded activity under the EAPO;

(c) derivatives held by certain corporate customers of the Santander UK Group in order to ensure that Santander UK as an RFB would not exceed the limit on permitted customer derivatives; and

(d) other activities that would be prohibited from being undertaken by Santander UK (as an RFB) on or after 1 January 2019.

*(2) Prohibited business and specified permitted business of ANTS to SLB*

86. There are approximately 222 customers and counterparties (including market counterparties) of ANTS who have live products, transactions or arrangements that are expected to be transferred to SLB under the RFTS, unless they have terminated or transferred beforehand. A further approximately 452 customers and counterparties with master agreements with ANTS under which there are no live trades will also transfer. The relevant Effective Dates are 9 July and 16 July 2018.

87. ANTS will transfer to SLB, to the extent it does not constitute ANTS Retained Business, ANTS' business, assets and liabilities in respect of:

(a) products, transactions and arrangements with organisations (such as other financial institutions) that would constitute or give rise to an "excluded activity" or a prohibited "financial institution exposure" for Santander UK under the EAPO, principally derivatives and securities finance transactions with financial institutions that are not linked to hedging or management of Santander UK's balance sheet risks or liquidity requirements, prohibited forms of derivatives with corporates and loans and other credit facilities made to entities that are RFIs;

(b) investments held by ANTS where holding or dealing in such investments would constitute an "excluded activity" under the EAPO;

(c) derivatives held by ANTS' exempt FI and Specified Corporate customers in order to ensure that Santander UK as an RFB would not exceed the limit on permitted customer derivatives; and

(d) other activities that would be prohibited from being undertaken by Santander UK (as an RFB) on or after 1 January 2019, such as ANTS' market making, institutional sales and debt capital markets activities.

*(3) Permitted business of ANTS to Santander UK*

88. There are approximately 451 customers and counterparties of ANTS who have products, transactions or arrangements that are expected to be transferred to Santander UK under the RFTS, unless they have terminated or transferred beforehand. A further approximately 33 customers with master agreements with ANTS under which there are no live trades will also transfer. The relevant Effective Date is 30 July 2018.

89. ANTS will transfer to Santander UK:

(a) ANTS' business, assets and liabilities in respect of activities that are permitted to be undertaken within the RFB sub-group from 1 January 2019 (save for the limited amount of permitted business referred to in paragraphs 86 and 88 above); and

(b) the rights and obligations of ANTS under contracts with suppliers and other third parties.

90. This broadly currently includes cash deposits and sterling and cash management services, loan, trade and asset finance facilities (other than with RFIs), structured notes and structured retail products, permitted derivatives with corporate customers of ANTS (other than the Specified Corporates) and derivatives, securities finance transactions and other positions that are linked to hedging or management of Santander UK's balance sheet risks or liquidity or collateral requirements. There are certain exceptions which allow a loan facility with an RFI to be retained in the RFB (e.g. an exemption for infrastructure SPVs).

*ANTS Retained Business*

91. A small portfolio of RFB Prohibited Business will be retained by ANTS. Some of it will mature, be novated or terminated before 1 January 2019 and therefore have the benefit of the Downstream Guarantee described below until such maturity, novation or termination; some of it will be retained after that date. Schedule 5 of the Scheme sets out all the ANTS Retained Business. (Some of this business was not considered by Mr Cole in his Scheme Report. He does so in the Supplementary Report and

concludes that there are no adverse effects in respect of the additional positions and arrangements as a consequence of the Scheme.)

92. Some further transactions, positions and arrangements have been identified as remaining in ANTS after 31 December 2018.

    (a) A limited partnership interest in an SME loan fund. This is an asset of ANTS and the counterparty has no exposure to the changes being made to ANTS.

    (b) A portfolio of bonds in a legacy social housing portfolio. Again, they are an asset of ANTS. The notional value of the portfolio is £18 million. It is intended to sell the portfolio but the bonds are illiquid and some more work needs to be done to ensure that all documentation is in place to enable a sale. No counterparties would be affected by the bonds remaining in ANTS.

93. ANTS also has various foreign law governed transactions or instruments, or foreign law governed transaction documents associated with English law governed loans. There is little of this left as it is being novated. Any that are left after the Final Effective Date will be subject to the Scheme, and therefore subject to the trust and indemnity arrangements under the Scheme, described further below, until their transfer can be effected.

*Cross-Guarantees*

94. Santander UK and ANTS have each guaranteed all of the other's unsubordinated obligations and liabilities under a series of deed poll guarantees (the "Cross-Guarantees"), with the exception of any debt securities issued by Santander UK, and notes that were transferred from ANTS to Santander UK, after 25 April 2016.

95. As part of the Scheme, the Cross-Guarantees will be unwound and each of Santander UK and ANTS will be released from all liabilities under the Cross-Guarantees with effect from 23:59 on 31 December 2018: see Clause 4 of the Scheme.

*The Downstream Guarantee*

96. As part of the Cross-Guarantees, Santander UK has guaranteed the unsubordinated liabilities of ANTS ("the Downstream Guarantee"). Creditors of ANTS, such as derivative counterparties, benefit from this Downstream Guarantee.

97. As ANTS will sit outside the RFB sub-group, the Downstream Guarantee will not be permitted under the ring-fencing rules. Art. 14(1) of the EAPO will prohibit Santander UK, as an RFB, from incurring exposures to RFIs (with certain exemptions). ANTS is an RFI under art 2(2) of the EAPO. Santander UK's guarantee of ANTS's unsecured liabilities is a direct exposure to ANTS.

98. It is intended that the creditors of the residual business of ANTS have the benefit of the Downstream Guarantee for as long as is permitted by the EAPO, particularly those creditors whose products, transactions and arrangements with ANTS mature or are transferred in the period after the final Effective Date and before 1 January 2019.

99. Most of the creditors of ANTS are being transferred either under the Scheme or by way of novation. Those with permitted business are largely being transferred to Santander UK and will therefore become direct creditors of Santander UK. Those with largely prohibited business will be transferred to SLB and become creditors of Banco Santander.

100. Although there are other products, transactions or arrangements that will remain with ANTS after 31 December 2018, there is only one creditor to a residual transaction who will do so. It is a market counterparty in relation to a Total Return Swap ("TRS").

101. Under the TRS, ANTS pays the market counterparty the principal and interest it receives on a portfolio of securities it holds. The market counterparty pays ANTS amounts calculated by reference to a notional amount that reduces as principal is paid on the underlying securities. If the value of the securities exceeds the present value of the amounts the market counterparty must pay ANTS, the market counterparty will be exposed to ANTS.

102. The Skilled Person concluded that the market counterparty will be adversely affected by the removal of the Downstream Guarantee although this has been appropriately mitigated by ANTS as it has agreed with the market counterparty to accept a replacement collateral portfolio: I return to this later.

*The Upstream Guarantee*

103. As part of the Cross-Guarantees, ANTS has guaranteed the unsubordinated liabilities of Santander UK ("the Upstream Guarantee"). Creditors of Santander UK such as depositors benefit from it.

104. The Upstream Guarantee is not prohibited by the ring-fencing rules. But the Companies have concluded that it makes no commercial sense for it to be continued, because its rationale depended on the existence of the Downstream Guarantee. The purpose of the Cross-Guarantees was to consolidate the credit positions of ANTS and Santander UK and thereby underpin a common credit rating.

105. Further, as explained at paragraph 22(A) of Roman 3, if the Upstream Guarantee remained in place, it would not be treated for regulatory purposes as an intra-group exposure with a 0% risk weight, but instead as an exposure to a third party. ANTS would therefore either breach the limit on large exposures under the Capital Requirements Regulation ("the CRR") or be required to take a corresponding 100% deduction from eligible capital resources resulting in a breach of regulatory capital compliance.

106. In any event, ANTS' gross asset base will be reduced from about £80 billion to about £1.1 billion. Many of the assets of ANTS to which Santander UK would have been permitted to have recourse under the Upstream Guarantee are being transferred to Santander UK. The other assets, which are being transferred to SLB or retained by ANTS, constitute prohibited business, and Santander UK as an RFB would not be permitted to have direct recourse to them.

*Business transferring outside the Santander Scheme*

*Migrations*

107. Part of the implementation of the Chosen Model involves the transfer of business outside the Santander Scheme.

108. Where certain assets and liabilities mature before the relevant Effective Date under the Santander Scheme they have been, or will be, held until maturity in the entity in which they are booked. Where practicable, new business has been, or will be, booked in the relevant target entity, being either SLB or Santander UK. Some loan or credit facilities that the borrower elects to re-finance before maturity have been dealt with in this way.

109. The small amount of residual prohibited business being retained in ANTS includes certain transactions and arrangements that mature (or are expected to be transferred out of ANTS) before 1 January 2019. They are included in schedule 5 of the Scheme.

110. There has also been a programme of novation or assignment (or, where relevant, clearing) of some loan or credit facilities, derivative portfolios and securities finance transactions that mature after the relevant Effective Date under the Scheme.

111. Some of the novations have involved customers or counterparties with transactions subject to foreign law who have been targeted to be novated before their relevant Effective Date where they would be subject to further novation-related steps even if transferred under the Scheme, in order to ensure that the transfers are fully effective under local law.

112. The process of migration either by way of novation, or by way of clearing of transactions, to Santander UK or SLB commenced in the summer of 2017. This has been done with customers and counterparties who expressed a preference to do so in sufficient time. From the Directions Hearing until 31 May 2018, 1,167 transactions had been novated or cleared.

113. As at 23 May 2018, this process has thus far resulted in about 63% of total business on a trade volume basis having been migrated to Santander UK or SLB that would otherwise have transferred under the Scheme. This migrated business has a combined notional value of £772 billion.

114. The novation process will continue in respect of customers that have transactions that are governed by the laws of a jurisdiction outside of the UK and novation or clearing may also continue until the relevant Effective Date in respect of a small number of other corporate and financial institutions. In particular, there is continuing engagement with certain US or US-affiliated swap dealers who have interest rate swaps with ANTS that are subject to US mandatory clearing rules if transferred through the Scheme on the relevant Effective Date of 9 July 2018.

115. The engagement with these US or US-affiliated swap dealers began in the summer of 2017 and has already dealt with 554 transactions with 6 market counterparties, with an agreement to clear a further 10 trades with one of them after the date of the Sanction Hearing. On this basis, as at 4 June 2018, there were 114 transactions with 2

market counterparties remaining in ANTS and engagement continues with these 2 market counterparties to seek to clear them through LCH (London Clearing House) before the relevant Effective Date. The Skilled Person has considered the impact of being subject to the US mandatory clearing rules in table 6 on page 35 of the Scheme Report and has concluded that the change in arrangements will have no adverse effect for the counterparties who are required to clear the interest rate swaps.

116. As part of the broader migration strategy, ANTS has also taken steps to transfer market risk relating to its fixed income trading books ahead of the Scheme as a preparatory step for transfers under the Scheme. This is explained in further detail at paragraph 64 of Roman 3.

*Crown Dependency branches*

117. As an RFB, Santander UK will not be permitted to retain its branches in Jersey and the Isle of Man ("IoM") (each also referred to as a "Crown Dependency") after 31 December 2018, nor will any member of its RFB sub-group. This is because neither of the Crown Dependencies are EEA members, and article 20 of the EAPO prohibits an RFB from having a branch in a country or territory which is not an EEA member state.

118. The transfer of the business of these branches to branches or subsidiaries of the Santander Group, outside the RFB sub-group is to be implemented under local law transfer schemes; but as the customers and other connected persons of the Crown Dependency branches would still be customers and connected persons of Santander UK at the effective dates of the Santander Scheme, the Skilled Person has, in his Supplementary Report, also included an assessment of them in relation to the Scheme; and he has concluded that here are no changes as a result of the Scheme that will have an adverse effect on customers or other persons connected to the Crown Dependency branches.

*Wider ring-fencing plan*

119. The wider ring-fencing plan being implemented outside the Scheme includes the closure of ANTS to new business, the transfer of capital from Santander UK and ANTS to Banco Santander to reflect the transfers of business, and the change of ownership of ANTS from Santander UK to UKHoldCo.

120. As noted, Santander UK has non-EEA branches in Jersey and the Isle of Man. ANTS has a non-EEA branch in Connecticut, USA which is expected to close later in 2018 and, until October 2017 when it was closed, it had a non-EEA branch in the Cayman Islands.

*Effective Dates of transfers under the Santander Scheme*

121. In order to manage an orderly transfer of business under the Scheme, four main Effective Dates have been provided for upon which transfers will occur following sanction of the Scheme, the dates being successive Mondays in July 2018. The four dates are grouped according to the different transfers of business. There are:

(a) two dates for business transferring from ANTS to SLB (i.e. the ANTS Prohibited Business that is transferring), namely:

(i) 9 July 2018 for business with or relating to market counterparties; and

(ii) 16 July 2018 for all other ANTS Prohibited Business;

(b) one date for business transferring from Santander UK to SLB (i.e. the Santander UK Prohibited Business that is transferring), namely 23 July 2018; and

(c) one date for business transferring from ANTS to Santander UK (i.e. the ANTS Permitted Business that is transferring), namely 30 July 2018.

122. The Santander Scheme has provided for a sweep-up date of 13 August 2018 for the transfer of any remaining business not already transferred. The Scheme also makes provision for the relevant transferor and transferee to agree a different date for any particular customer's business, falling between the date the Scheme is sanctioned and 13 August 2018. Any transfer after 13 August 2018 will be a modification of the Scheme and will need to comply with clause 25 of the Scheme, which entails, amongst other things, notification to the Regulators.

### *[J] Brexit*

123. At the Sanction Hearing there was, inevitably, considerable discussion of the effect of the impending departure of the UK from the EU ("Brexit") and in particular, a unique feature of the Santander Scheme in terms of the other RFTSs that have come before the Courts, which is that the transferee is a non-UK entity, though it is also to be noted that SLB is registered in the United Kingdom as a UK establishment of Banco Santander and is subject to regulation by the FCA and PRA.

124. Banco Santander, an EU credit institution regulated by the ECB and Bank of Spain (as home state regulators), has validly exercised its right to establish SLB, as a UK branch, and to provide cross border banking and investment services in accordance with the passporting rights afforded by the EU CRDIV and MIFID II Directives. More particularly, SLB is established and authorised through the exercise of freedom of establishment rights under Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and Directive 2014/65/EU on markets in financial instruments, often referred to as "passporting" rights. SLB is therefore established and authorised pursuant to the passporting rights under section 31 and schedule 3 of FSMA, with the PRA and FCA as its host state regulators.

125. There is a risk that upon the UK ceasing to be a member of the European Union with no transitional or preservation arrangements in place for EEA passporting rights, SLB may not then have the relevant authorisations to do business here.

126. As Mr Moore acknowledged in his oral submissions, the Chosen Model does leave SLB as an entity that may be particularly and adversely affected according to the

outcome of the Brexit negotiations. That is a particular risk not arising in the other RFTSs which have come before the Court. It is not at all an easy risk to assess: the risk of a 'hard' or 'no deal' Brexit was at the time of the Sanction hearing, and has remained, impossible to quantify, and in reality all that can be undertaken is an assessment of (a) what arrangements have been suggested to cover the position in the event of a 'hard' or 'no deal' Brexit; and (b) whether, having regard to those arrangements, the choice of the Chosen Model should be regarded as inappropriate, or perhaps more accurately in the context of Part VII FSMA and the statutory questions to be addressed, as having an "adverse effect likely to be greater than is reasonably necessary in order to achieve" the statutory purpose of ring-fencing.

127. As to (a) in the preceding paragraph [126], the ongoing permission to operate SLB as a branch of Banco Santander in the UK is central to the design of the Santander Scheme and to its medium-term viability. The question therefore as to the certainty and robustness of the arrangements intended and contemplated to enable that permission to continue, or for there to be put in place workable alternatives, is an important and difficult one. It necessitates consideration of the contingency planning, which was helpfully explained to me in some detail.

128. On 20 December 2017 (and thus after the publication of the Scheme Report), the Deputy Governor of the PRA issued a "Dear CEO" letter to firms such as Banco Santander that undertake cross-border activities between the UK and other European Union member states, which stated that (a) in the absence of continued passporting rights post-Brexit, firms currently exercising rights to establish a branch or provide services in the UK would need to seek PRA authorisation to carry out PRA-regulated activities in the UK; (b) the PRA recommended that such 'inbound' firms should engage with the PRA for pre-application discussions; and that (c) under the statutory deadlines that apply, the authorisation process may take up to 12 months from the point of application.

129. Then, on 28 March 2018, the PRA issued a further "Dear CEO" letter (alongside a Policy Statement (PS3/18) and Supervisory Statement (SS1/18)) on its approach to branch authorisation and supervision recognising: (a) the political agreement between the UK and the EU that there should be an implementation period until the end of 2020 as part of the withdrawal agreement; and that (b) the UK Government had committed to bringing forward legislation, if needed, to create temporary permissions for relevant firms to continue their activities in the UK should a withdrawal agreement not be made and ratified.

130. As a result, the PRA concluded that firms may plan on the assumption that PRA authorisation will only be needed by the end of the implementation period. The PRA's conclusions were such as to provide SLB with reassurance that, even if the process of authorisation of SLB is not complete by 29 March 2019, it would not lose its authorisation to carry out regulated activities in the UK even if there are no transitional arrangements or other preservation of the relevant passporting rights presently available to and relied on by SLB.

131. Nevertheless, as a precaution and despite the reassurance offered, SLB started the process some time ago for seeking authorisation from the PRA as a "third country branch" of Banco Santander. That is consistent with the PRA's approach to branch authorisation and supervision as outlined in PS3/18 and SS1/18.

132. Whilst there is still irreducible uncertainty as to how these matters will develop and as to which of the contingencies may arise, Mr Phillips QC confirmed on behalf of the Regulators that in view of the contingency plans and SLB's application for authorisation in case of further difficulty, the PRA did not consider the uncertainties to be such as to cause it to object to the Chosen Model. In his oral submissions on Day 2 of the Sanction Hearing, Mr Phillips (after I had voiced some concern) provided on instructions the following careful, but important, statement:

> "My Lord, in terms of the material and evidence that has been put before you, it may assist you to know, so far as the PRA is concerned, that it is content that the assumptions in respect of ongoing permission for the operation of SLB as a branch…are well founded. The various PRA publications referred to…have been accurately portrayed and are fairly and properly relied upon. Finally, the references in the evidence to which you have been taken to the application for authorisation in respect of SLB are also correct. In a little more detail about the PRA's policy position…consultation paper CP29/17 and the PRA policy statement PS3/18…set out the PRA's approach to the authorisation and supervision of branches, including those currently using passporting arrangements such as SLB and which are intending to apply for PRA authorisation in order to continue operating as a third country after the UK's withdrawal. Given the PRA's position set out in those documents, and in particular the presumption that there will continue to be a high degree of supervisory co-operation between the UK and the EU, it is reasonable in the PRA's view for SLB to continue working on the assumption that the PRA will likely be prepared to authorise the firm as a third country branch. Obviously the PRA, in common with many institutions, organisations and individuals, will have to keep its policy under review in the next months and years to assess whether any changes will be required to the UK regulatory framework including those, of course, arising once any new arrangements with the EU take effect…"

133. The Skilled Person (in his Supplemental Report), having considered the contingency planning, likewise was reluctant to peer much into the future, but confirmed his view that the Chosen Model was appropriate and the best of the choices available (see further below); and Ms Eborall on his behalf confirmed expressly in the course of her oral submissions that any uncertainties were not such as to call the scheme design into question or likely to render it unviable in the foreseeable future.

134. In my judgment, the Court has no basis for gainsaying these nuanced but reasonably clear assessments as to the likely effect of Brexit in terms of the ability of SLB to continue its business in the UK. The outlook is certainly not risk-free; but contingency planning has reduced these risks: and, in any event, I accept that there is no risk-free

solution. The question then is whether some other scheme model would be less of a risk overall.

135. As to (b) in paragraph [126] above, in the course of the hearing, I ventilated considerable concern as to the exposure incidental to the Chosen Model, including not only the issue of authorisation and passporting, but also the risks of having to enforce judgments against a foreign transferee if the present system of recognition and enforcement falls away (albeit these may be reduced by the fact that Mr Moore told me that "a lot of the contracts will be English law governed contracts").

136. I queried, for example, whether the risks might have been removed or reduced by a different model: for example, a design (such as indeed was originally contemplated) with as its centre a UK entity guaranteed by Banco Santander; or one for the 'subsidiarisation' of SLB with additional guarantees. Mr Moore helpfully took me through the various arguments; and I invited Ms Eborall, representing the Skilled Person, to elaborate on his views in this regard as already expanded in his Supplementary Report; and Mr Phillips, on behalf of the Regulators, also addressed me on these concerns, although he was careful to emphasise that

> "The PRA cannot speculate on the future legislative regime in the United Kingdom in relation to Brexit or indeed in relation to any other changes in the law."

137. Mr Moore stressed the careful process of assessment which had been undertaken, and the iterative discussions with the Regulators and the Skilled Person which had guided and developed the choice of structure. He took me through the evidence of Mr Roman (some of which I have quoted in paragraph [32] above), highlighting the balance of advantage, disadvantage and risk inherent in each available choice. Mr Moore accepted that the Chosen Model brought some risk; but his fundamental point was that the reality is that each alternative model has its own particular risks and benefits: there is no perfect or risk-free choice. Drawing especially from Roman 3 he stressed in particular that

(1) the Chosen Model offered the considerable advantage of the financial size and strength of Banco Santander, whereas both the original model and the alternative of the establishment of a UK NRFB as a subsidiary of Santander to which all the existing business of SLB would be transferred "would have entailed materially greater financial viability risks when compared to the Chosen Model (since a subsidiarised SLB would no longer benefit from being part of Banco Santander's balance sheet)" and in all probability also "significantly greater impact on corporate customers due to the higher number of such customers whose products and services would have been needed to transfer from Santander UK and/or ANTS to the subsidiarised SLB…in order to reduce the financial risk of a subsidiarised SLB"; and that

(2) "when compared to the Chosen Model, [the other structures] would not have provided as much flexibility in the context of Brexit uncertainty (noting the potential future need to relocate SLB's EEA business to an EEA establishment irrespective of the model)."

138. Ms Eborall accepted this approach and its conclusion that the Chosen Model represented an entirely reasonable balance between advantage, disadvantage and risk, and probably the most appropriate of inevitably imperfect available solutions. She reminded me that in the Scheme Report the Skilled Person had concluded that the original ring-fencing plan, with ANTS as a non-ring fenced transferee would not have worked; and the alternative of a subsidiarised SLB would not have achieved the requisite size or financial strength either. She also emphasised that the Skilled Person had revisited the comparison of scheme structures and the impact of Brexit in his Supplementary Report, and she took me through relevant parts of that report to explain the basis of his confirmation in that report that

> "the [Chosen Model] continues to be the best option available."

139. Mr Phillips confirmed the PRA's approval of the application for sanction, having taken (to quote from his oral submissions) "into consideration future scenarios which would have an impact on the firm's business model, including, of course, in the light of the UK's withdrawal from the UK".

140. In the end, and given that ring-fencing is mandated, I accept that the choice is between solutions which according to the circumstances may each have different adverse effects. As will already be apparent, it is implicit in the statutory questions to be addressed that a scheme may be approved notwithstanding that it has material adverse effects, so long as those adverse effects are not likely to be greater than reasonably necessary in order to achieve the statutory purpose.

141. The view of the each of the applicant Company's' directors, supported by the Skilled Person, that the Santander Scheme, and the Chosen Model it is designed to implement in the round offer, the best option for achieving the statutory purpose has been fully explained and, again, in my judgment, there is no real basis for the Court to gainsay it. The PRA has approved the Santander Scheme and does not object to Santander's chosen model for structural reform; and the Skilled Person has carefully assessed both the inherent Brexit-related risks and the Chosen Model in that context and is satisfied that the Chosen Model is the best option in that context also.

142. These considerations also guided the choice of the Chosen Model and in particular, the decision not to have SLB incorporated as a new legal entity as a UK NRFB. Put shortly, the decision taken was that this could have entailed risk in that SLB would on that basis no longer be part of Banco Santander's balance sheet, and the new entity, with a smaller balance sheet, would in all likelihood have had a lower credit rating than Santander UK and Banco Santander. Nor would it have given as much flexibility on managing Brexit risk, given the possibility that SLB's EEA business may have to be re-located to an EEA establishment.

143. Thus, though for the reasons I sought to explain in paragraphs 154 to 157 of my judgment in the *Lloyds Scheme* [2018] EWHC 1034 (Ch) and which I have summarised at paragraph [25] above, I have been concerned to test whether any material adverse effect of the Chosen Model might have been avoided by another scheme design having no other greater adverse effect, I am satisfied that there is no sufficient reason to displace the views of the Skilled Person and the directors who have the primary responsibility, in the exercise of their commercial judgement, of scheme selection, without demur on the part of the PRA, that the Chosen Model is,

overall, the best choice. It follows also that I am satisfied that the adverse effect of the Chosen Model is not greater than reasonably necessary in order to achieve the statutory purpose.

### *[K] Customer queries, concerns, representations and formal objections*

*Queries and concerns*

144. The main themes arising from specific queries or concerns in the Front Office Comms were summarised in Roman 2, and briefly were as follows:

(1) Mr Roman summarised the queries received as being "requests for information regarding the Scheme; novation vs transfer under the Scheme; the correct destination of the customer and basis for trading in its new destination/entity; certain accounting queries; and Brexit-related queries regarding the Scheme…" Having also considered a summary provided by Mr Roman of the communications, and a breakdown of the number and nature of customer and stakeholder correspondence, I have been persuaded, as were the Skilled Person and the Regulators, that these have been answered satisfactorily.

(2) Many of the concerns were directed to the lower credit rating of Banco Santander, and therefore of SLB, relative to Santander UK and ANTS. These concerns have since been ameliorated by credit ratings upgrades in April 2018 for Banco Santander. Standard & Poor's and Moody's have both upgraded Banco Santander (and therefore SLB) so that:

(a) S&P now gives it the same long-term and short-term credit rating as Santander UK and ANTS; and

(b) the short-term credit rating given to it by Moody's is the same as that of Santander UK and ANTS, and the differential in the Moody's long-term credit rating has narrowed to two notches.

(3) The other main category of concerns registered in the Front Office Comms related to residual portfolios of interest rate swaps with US or US-affiliated swap dealers that will fall to be cleared under US mandatory clearing rules upon transfer under the Scheme. These concerns have been or are in the process of being addressed and none resulted in any customer objecting to the Santander Scheme. The Skilled Person was also satisfied that appropriate steps have been taken, or are being taken, to respond to the customers and address their concerns and that the Companies have provided them with sufficient information and assistance to resolve their issues.

*Written statements under section 110(5) FSMA*

145. The Companies also established a process for managing formal objections to the Scheme by way of written representations under section 110(5) of FSMA. Section 110(5) introduces a condition to the right to be heard in an RFTS. A person who alleges that he or she will be adversely affected by the carrying out of the RFTS and wishes to be heard by the court must file with the court, a written statement of the

representations that he or she wishes the court to consider and serve copies of the statement on the PRA and the transferor concerned.

146. Mr Roman explained this process in Roman 2. In summary:

(1) The written representations were required to be served on the relevant transferor (Santander UK or ANTS) and the PRA, in addition to being filed at the Court. The guidance approved by the Court at the Directions Hearing was included on the ring-fencing microsite on 6 February 2018 including guidance as to how to file representations by CE-Filing. The Companies performed weekly checks of the CE-File and reconciliations of any objections served on the PRA or the Companies or filed with the Court. Since 8 May 2018, these checks have been daily.

(2) Notwithstanding the Representation Date of 14 May 2018, being the date by which objectors were asked to file their written representations under section 110(5) FSMA, the Companies continued to monitor the CE-File. As at the date of the Sanction earing there had been no written representations filed with the Court or served on a relevant transferor after the Representation Date, except as referred to next.

*Objections*

147. There was has been only one written representation; and this has been treated as an objection to the Santander Scheme.

148. On 20 February 2018, Mr Robert Brown, a Jersey resident, filed an objection to the Scheme (as he had done in respect of the three earlier English RFTSs). By letter dated 30 April 2018, Santander wrote to Mr Brown, responding to his objection. By email dated 22 May 2018, Mr Brown informed the Companies that, whilst he wished to leave his objection in place, he would not be attending the Sanction Hearing.

149. The substance of Mr Brown's objection was that, as a Jersey resident, he cannot have a relationship with an RFB and must, instead, have a relationship with a NRFB, thus exposing him to an increased risk of financial loss should the NRFB fail. Mr Brown also believes that a failure of a non-RFB would reduce the already limited providers of retail banking services in Jersey.

150. Mr Brown has confirmed that he has no direct connection with Santander UK or ANTS: he did not suggest that he had any transactions, products or arrangements with Santander UK's Jersey branch or Santander UK or ANTS.

151. That did not in itself preclude him from having the right to allege that he would be adversely affected by the Scheme. However, Mr Brown's objections were not really to the Santander Scheme as such, any more than to the other RFTSs where he exercised his right to attend to make objection. The fact is that as Jersey is not an EEA member state, the RFBs of the five big UK banks will be prohibited from having branches there, and likewise will not be able to have any subsidiaries incorporated in those jurisdictions within their RFB sub-groups.

152. In any event, I am satisfied, for the same reasons as I sought to set out in my judgment on the *Lloyds Scheme* [2018] EWHC 1034 (Ch) at paragraphs 208 to 216, that Mr Brown's representations did not provide any basis for the court to refuse to sanction the Scheme: see also paragraphs 111 and 114 of *Barclays No 5* [2018] EWHC 472 (Ch) and paragraphs 50 to 53 of *HSBC No 3* [2018] EWHC 1385 (Ch).

### *[L] Proposed amendments to the Santander Scheme*

153. The Companies proposed some minor and clarificatory amendments to the Santander Scheme, summarised at paragraph 47 of Roman 3.

154. Clause 25.1 of the Santander Scheme provides that the Companies and Banco Santander may consent jointly for and on behalf of themselves and all other persons concerned to make any modification of or addition to the Scheme which, prior to its sanction, the Court may approve or impose. The Regulators were notified of these amendments and raised no objections. The Skilled Person, having considered them, concluded that they gave rise to no adverse effect.

155. I was satisfied that the amendments had been properly considered and approved in accordance with Clause 25.1 of the Santander Scheme, and were unobjectionable, so that the Scheme should be considered and sanctioned as so amended.

### *[M] Skilled Person's Supplementary Report and conclusions in more detail*

156. After the publication of the Scheme Report, new information became available to Mr Cole which he considered and analysed in his Supplementary Report dated 31 May 2018 (as well as addressing queries and concerns as well as the one formal objection from Mr Brown, and the implementation of the Communications Plan).

157. Mr Cole recorded the following changes since the publication of his Scheme Report:

(1) *Numbers affected, including employees and pension scheme members:* He has updated the numbers of customers and other persons affected. The customer figures have all reduced, which is due, in part, to a customer preference for novation rather than transfer via the Scheme. Figures for the number of non-branch employees transferring has risen from 213 to 222 employees, but Mr Cole was satisfied that the changes in numbers are necessary to provide the support and service to customers transferring to SLB (see §4.3.2 Supplementary Report **[2/2/35]**). The affected pension scheme members have also changed from 11 to 10, including 1 new employee identified in March 2018. The new employee is adversely affected, but no more than reasonably necessary, in line with Mr Cole's findings in his main report.

(2) *US, or US affiliated, swap dealers:* At the time of the Scheme Report, it was anticipated that market counterparties that were planning on transferring products through the LCH to Banco Santander and/or SLB prior to the implementation of the Scheme, would do so in advance of the Sanction Hearing. However, as at the date of the Supplementary Report, the Skilled Person was advised that four US or US-affiliated swap dealers still had open

interest rate swaps that may not clear through the LCH by the Sanction Hearing date and, if transferred under the Scheme, will be subject to mandatory US clearing and its associated costs. The Supplementary Report recorded that Santander was continuing to work with the four US or US affiliated swap dealers to agree the timing and terms of the transfer of the transactions through clearing at LCH ahead of the Scheme, and such discussions would continue until the date of the Sanction Hearing. The Skilled Person has concluded that, should these transactions for these US or US affiliated swap dealers transfer under the Scheme, there is no adverse effect for these counterparties because SLB has confirmed that it will cover and/or remediate any associated clearing costs.

(3) *Further (potential) adverse effect (CVA) upon Santander UK and/or ANTS RFIs:* Mr Cole previously considered in his Scheme Report that the CVA calculation of this customer cohort group was not potentially affected because their derivative positions would be subject to collateral positions in the associated CSA (Credit Support Annex) between Santander UK/ANTS and those customers. However, the Skilled Person was then made aware that: (1) there are RFIs who do not have a CSA under which Santander UK or ANTS provides collateral; and (2) it cannot be demonstrated that the CSAs will entirely mitigate the potential adverse effect. Accordingly, in his Supplementary Report Mr Cole documented this as a further (potential) adverse effect upon RFIs, albeit that it is likely to be reduced, if not entirely, for those RFIs who have CSAs; but that the adverse effect is not greater than reasonably necessary to achieve the Scheme's ring-fencing purposes.

(4) *Jersey and IoM branches:* as previously mentioned, in his Supplementary Report, Mr Cole also assessed the Statutory Question in respect of customers and other persons connected to the Santander UK Jersey and IoM branches, as set out further below at (3).

(5) *ANTS:* In his Supplementary Report, the Skilled Person records that the Ring-Fencing Programme had identified a number of additional positions and arrangements that will remain in ANTS after 1 January 2019, including 23 non-English law governed transactions[5] and English law governed loans and derivatives with associated transaction documents governed by foreign law. This increased the 'worst case scenario' figure that would be required to be held on the ANTS balance sheet from £900m to £1.1bn. Having considered those changes, and the revised balance sheet, Mr Cole concluded that he does not consider that there are any adverse effects arising as a result of this change.

158. In the round, in his Supplementary Report:

(1) Mr Cole confirmed that his findings and conclusions on the Statutory Question remain unchanged (including having taken into account 1 new potential adverse effect he identified);

(2) His opinion remained that there are groups of customers and other persons who are likely to be adversely affected by the Santander Scheme; however, he

[5] Note that these are additional to the 18 foreign law contracts identified at §26.1.2 Scheme Report.

remains satisfied that the adverse effects are not likely to be greater than reasonably necessary in order to achieve the Santander Scheme's purposes.

(3) He confirmed that there are no new groups of customers or other persons adversely affected other than those identified in the Scheme Report and there are no new adverse effects not already identified in the Scheme Report.

159. In his Supplementary Report, Mr Cole also addressed three points I had raised at the 5 February 2018 Directions Hearing, as follows:

(1) *Additional collateral point:* The Skilled Person noted that the estimated total liquidity that would be required for SLB to provide the additional collateral as a consequence of rating trigger clauses would be in the order of £240m (as at 9 April 2018). Given the financial analysis that the Skilled Person has carried out on the viability and sustainability of Banco Santander, he had satisfied himself that this additional potential exposure would not be significant.

(2) *ANTS remaining customers point:* In his Supplementary Report Mr Cole has explained that only 1 of the 2 ANTS RFI customers remaining in ANTS would be adversely affected by the loss of ANTS' credit rating because it is only under the total return swap that ANTS pays the RFI customer (a market counterparty), whereas there is no additional exposure for the customer (an insurance company) with the secured annuity transaction.

(3) *Pension scheme members point:* I asked whether: (1) the Pensions Regulator (TPR) or the pension scheme trustees had been consulted in relation to the adversely affected pension scheme members; and (2) the 11 members had received personalised written correspondence. Mr Coles has explained that, in relation to (1), the trustee and TPR were consulted in July 2017 and that arrangements have since been signed off by both Santander UK and the trustee and, in relation to (2), each affected member received formal notification, had individual meetings with a pension expert, and have been provided with a compensation package (which has been updated since the Scheme Report). Mr Cole has concluded that he is satisfied that the updated compensation package provides a forecast net positive outcome for all deferred pension scheme members (including the further one member identified since the Scheme Report).

160. Lastly, beyond recording that Mr Cole was satisfied (as previously confirmed) I do not think it is necessary to address further the Communications Plan and its effectiveness, since I have already substantively dealt with this under that earlier heading.

161. In all the circumstances, Mr Cole confirmed in his Supplementary Report that he remained:

> "satisfied that the adverse effects identified are not likely to be greater than reasonably necessary in order to achieve the Scheme's Purposes."

*Assessment of the Scheme Report and the Supplementary Report in the round*

162. As I said of the reports in the *Lloyds Scheme*, Mr Cole's reports seemed to me to be exemplary: meticulous and comprehensive, clear and candid.

163. The same observations as I made in that earlier scheme (at paragraph 237 of my judgment) apply just as much to Mr Cole's reports:

> "He has adopted a clear and transparent approach, identified adverse effects, explored whether they are more than necessary, worked with the Applicants to mitigate them, and explained in detail his conclusion that they are no greater than reasonably necessary to achieve the statutory purpose. I have detected no material inconsistency, illogicality or discordance in his assessments, nor any reason to doubt or qualify the overall conclusions he has reached."

## *[N] Conclusions on whether the Court should sanction the Santander Scheme*

164. Mr Moore submitted, and I accept, that:

(1) The directors of the Companies, who I understand to be unanimous in recommending the Santander Scheme, gave careful consideration to both the high-level design of the Scheme and the scope of the transferring business. Their choice of the Chosen Model is readily understandable and, in my judgment, both reasoned and balanced. An extensive and lengthy due diligence process was demonstrated to have been undertaken to identify the assets and liabilities which should be transferred under the Scheme in light of the regulatory requirements and the model adopted by Santander and any amendments needed to contracts and underlying documentation in relation to the transferring business. Most importantly, as part of the due diligence, Santander sought to identify the potential adverse effects of the Scheme, what mitigating action could reasonably be taken by Santander, and whether any potential adverse effects (after mitigation) were likely to be greater than reasonably necessary to achieve the ring-fencing purpose.

(2) Santander has sought, where possible, to mitigate the adverse financial and product effects which customers with products transferring may experience as a result of the Scheme.

(3) The Skilled Person has prepared a thorough and detailed Scheme Report and Supplementary Report and is satisfied that where he considers that the Scheme is likely to have an adverse effect, that effect is no greater than reasonably necessary in order to achieve the Scheme Purposes. That opinion from an independent banking expert should be given appropriate weight: see paragraph 78 of the Chancellor's judgment in the *HSBC Scheme*.

(4) There has been the usual, requisite and salutary iterative process with the Regulators. The PRA has consented to both the issue and making of the

Sanction Application, having consulted with the FCA. All the necessary certificates have been obtained. The PRA concluded that the Scheme was suitable to be approved by the Court.

(5) The Scheme has been sufficiently publicised and explained to ensure that any persons who might wish to allege that they were adversely affected could do so.

(6) Finally, the only filed objection does not give any ground for concluding that it is not appropriate to sanction the Scheme as a matter of discretion. Nor do the concerns communicated to the Companies other than as filed objections.

165. In such circumstances, and in line with the answers given by the Skilled Person to the Statutory Question, and the assessment of the Regulators, I saw no reason to refuse sanction of this Santander Scheme.

## *[O] Form of Order*

166. At the conclusion of the Sanction Hearing I approved the proposed Order accordingly.

167. As in all the other RFTSs, and as is standard in the context of other Part VII schemes, that Order contains provisions for the terms of the Scheme to take effect under section 112 FSMA without further act or instrument and as if each were separately set out in the Order.

168. Section 112 FSMA gives the Court power to make orders ancillary to a sanction order under s.111(1):

> *"(1) If the court makes an order under section 111(1), it may by that or any subsequent order make such provision (if any) as it thinks fit—*
>
> *(a) for the transfer to the transferee of the whole or any part of the undertaking concerned and of any property or liabilities of the authorised person concerned;*
>
> *(b) for the allotment or appropriation by the transferee of any shares, debentures, policies or other similar interests in the transferee which under the scheme are to be allotted or appropriated to or for any other person;*
>
> *(c) for the continuation by (or against) the transferee of any pending legal proceedings by (or against) the authorised person concerned;*
>
> *(d) with respect to such incidental, consequential and supplementary matters as are, in its opinion, necessary to secure that the scheme is fully and effectively carried out.*
>
> *(2) An order under subsection (1)(a) may—*

*(a) transfer property or liabilities whether or not the authorised person concerned otherwise has the capacity to effect the transfer in question;*

*(b) make provision in relation to property which was held by the authorised person concerned as trustee;*

*(c) make provision as to future or contingent rights or liabilities of the authorised person concerned, including provision as to the construction of instruments (including wills) under which such rights or liabilities may arise;*

*(d) make provision as to the consequences of the transfer in relation to any occupational pension scheme (within the meaning of section 150(5) of the Finance Act 2004) operated by or on behalf of the authorised person concerned.*

*(2A) Subsection (2)(a) is to be taken to include power to make provision in an order—*

*(a) for the transfer of property or liabilities which would not otherwise be capable of being transferred or assigned;*

*(b) for a transfer of property or liabilities to take effect as if there were—*

*(i) no such requirement to obtain a person's consent or concurrence, and*

*(ii) no such contravention, liability or interference with any interest or right,*

*as there would otherwise be (in the case of a transfer apart from this section) by reason of any provision falling within subsection (2B).*

*(2B) A provision falls within this subsection to the extent that it has effect (whether under an enactment or agreement or otherwise) in relation to the terms on which the authorised person concerned is entitled to the property or subject to the liabilities in question.*

*(2C) Nothing in subsection (2A) or (2B) is to be read as limiting the scope of subsection (1)."*

169. These powers are further bolstered by s112A:

> *"(1) Subsection (2) applies where (apart from that subsection) a person would be entitled, in consequence of anything done or likely to be done by or under this Part with an insurance business transfer scheme, a banking business transfer scheme or a ring-fencing transfer scheme-*
>
> *(a) to terminate, modify or acquire or claim an interest or right; or*
> *(b) to treat an interest or right as terminated or modified.*
>
> *(2) The entitlement-*
>
> *(a) is not enforceable in relation to that interest or right until after an order has been made under section 112(1) in relation to the scheme; and*
>
> *(b) is then enforceable in relation to that interest or right only insofar as the order contains provisions to that effect.*
>
> *(3) Nothing in subsection (1) or (2) is to be read as limiting the scope of section 112(1).*

170. Authorities decided in the context of other species of Part VII schemes have confirmed that the Court's jurisdiction to make ancillary orders under s.112 is thus very broad. I referred to these more particularly in my judgment in the *Lloyds Scheme* at paragraphs 246 to 247. As I also there recorded, the Chancellor has expressly endorsed the application of the *dicta* in these cases to RFTSs; I entirely agree and I have adopted that approach.

171. In that connection, I confirm that I was satisfied that the powers conferred in sections 112 and 112A FSMA extended to enable the unwinding of the Cross- Guarantees. I was satisfied in particular that the continued existence of the Cross-Guarantees is wholly inconsistent with the RFTS and the wider ring-fencing provisions, and that it is practically impossible to maintain a commercially coherent cross guarantee arrangement and at the same time comply with the ring-fencing provisions.

172. I was reassured in that context both by Snowden J's approach in *In re Copenhagen Reinsurance Co (UK) Ltd* [2016] EWHC 944 (Ch), where he held that the Court had the power to modify the terms of certain guarantees given in respect of insurance policies which were to be transferred pursuant to an insurance business transfer scheme under section 105 FSMA, and by the Chancellor's observations and approval in the *Barclays Scheme* and the *HSBC Scheme.* In the *Barclays Scheme,* the Chancellor noted that:

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

173. Lastly, I should note one point of departure from the practice hitherto in insurance and banking schemes. As I noted in paragraph 250 of my judgment in the *Lloyds Scheme*, in relation to insurance business transfer schemes and ordinary banking business transfers it has been the practice for the order sanctioning the scheme to set out a large number of matters in respect of which an order under section 112 is made. These range from the transfer of the assets and liabilities from the transferor to the transferee (see s.112(1)(a)), the continuation of legal proceedings (see s.112(1)(c)), to other provisions in the Scheme overriding contractual rights, splitting security, amending references to terms in contracts and other documents and providing for the transfer of customer data, confidentiality etc. (under s.112(1)(d)).

174. That approach was not followed in the Barclays RFTS nor, to a large extent, in the Lloyds or HSBC RFTSs. In the *Lloyds Scheme,* I suggested a middle way, as explained in more detail in my judgment in that case at paragraphs 251 to 256. In this case, a form of order was proposed which was modelled on that middle way and I was content to approve it accordingly.

175. The Companies also sought the Court's approval for attaching the Summary of the Scheme to the final order. This has also been done in the Barclays, Lloyds and HSBC RTFS sanction orders. The order makes clear (as the Summary does on its face) that the Summary should not be relied on in place of the Scheme itself. The Summary attached to the order has had some slight modifications made to it to reflect the fact that it speaks as at the date the Scheme has been sanctioned.