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Case No: CR-2023-000341

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

Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 15 August 2023

Before :

THE HON MR JUSTICE MELLOR

- -

IN THE MATTER OF AS LHV PANK (UK BRANCH)

-and-

IN THE MATTER OF LHV BANK LIMITED

Claimants

-and-

IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

- -
- -

Martin Moore KC (instructed by **White & Case LLP**) for the **Claimants**

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Approved Judgment

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

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor :

Introduction

1. On this application the Claimants, AS LHV Pank[1] (UK Branch) ("LHV") and LHV UK Ltd ("LHV UK") seek an order under s.111(1) of the Financial Services and Markets Act 2000 ("FSMA") sanctioning a scheme to transfer the deposit-taking, banking and regulated payment services business carried on in the UK by the UK branch of LHV together with the related rights and liabilities ("the Transferring Business") to LHV UK, which is a wholly owned subsidiary of LHV's holding company, AS LHV Group, plus ancillary orders under s.112.

2. The Claimants appear by Mr Moore KC, instructed by White & Case LLP and Mr Moore and his team have assisted me with a helpful skeleton argument drawing my attention to the applicable principles and to the relevant documents in the hearing bundles. The application is supported by two witness statements of Mr Andres Kitter, who is the general manager of LHV and a director of LHV UK .

3. The claim itself was commenced by Part 8 Claim form issued on 4th May 2023. The matter came before Deputy ICC Judge Frith on 15th May 2023 for directions including the publication of the notice referred to in regulation 5(2) of the relevant Regulations (The FSMA 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625)), the notice having been approved by the Prudential Regulation Authority ("PRA"). One of the purposes of the notice is to provide the address from which the summary of the Scheme ("the Explanatory Statement") may be obtained.

4. LHV is a large Estonian bank which is authorised and regulated by the Estonian Financial Supervision and Resolution Authority. Prior to the departure of the United Kingdom from the European Union ("**Exit Date**"), LHV was entitled to provide services in the United Kingdom through its UK branch under the passporting regime exercising its rights of freedom of services and establishment. Since the Exit Date, the passporting regime has no longer applied but financial services firms based in the European Economic Area have been permitted to carry on the same activities as they carried on prior to the Exit Date pursuant to the temporary permissions regime put in place by the UK Government. The temporary permissions regime is time-limited (as its name suggests) and expires on 31st December 2023. It has therefore been necessary, to ensure continuity of service provision to its UK customers, for LHV to establish a UK authorised person who has the requisite regulatory permission to carry on the same activities as the UK branch and to transfer the business of the UK branch to it prior to 31st December 2023. Thus, LHV UK was incorporated on 4th February 2021 and has, since 2nd May 2023, been authorised pursuant to Part 4A of FSMA to carry on the business proposed to be transferred to it.

5. The distinct advantage of a banking business transfer scheme under the relevant part of the FSMA is that it provides a legal mechanism to transfer the Transferor's UK deposit taking and payment services business to the Transferee without requiring the Transferor's customers suppliers and other contractual counterparties to sign new documentation. This type of scheme allows for the automatic transfer of a large number

[1] Which is not a typo.

of separate legal relationships with customers, suppliers and other counterparties instead of requiring individual counterparty consent. Naturally this type of scheme is subject to careful regulatory and court scrutiny intended to ensure that any potential adverse effects are identified and those persons adversely affected are given the opportunity to make their views known. In broad overview, there are three layers of protection. The first is oversight of the proposed scheme by the PRA (largely as to capital adequacy) and the Financial Conduct Authority ("FCA", as to conduct). The second is the communication programme to inform stakeholders of the terms of the proposed scheme and their right to object. The third is provided by the Court's role in only sanctioning a scheme provided all the requirements in the FSMA are met.

The Transferring Business

6. The business to be transferred comprises accepting deposits from UK customers and providing to UK customers transactional and client safeguarding accounts, related payments services including access to payment and payment processing schemes, acquiring services, virtual IBANs (which is a banking service whereby customers are able to send and receive payments using multiple unique account numbers which relate to a single underlying pooled account) and foreign exchange services. These contracts are all governed by English law. The deposits from customers are not on lent but are held in sterling deposits with the Bank of England. The customers (said to number around 101) are not private individuals but rather commercial entities such as e-money issuers, authorised payment, non-bank financial institutions and virtual asset service providers (e.g. crypto finance businesses). As at 31st March 2023, the UK branch had total assets of £166,470,322 and deposits of £103,324,107.

Applicable law

7. Mr Moore KC addressed me on two topics. The first is concerned with the Court's jurisdiction to sanction a scheme of this type. The second is concerned with the Court's power to make ancillary orders under s.112 FSMA.

Jurisdiction

8. Although s.111(1) FSMA sets out the conditions which must be satisfied before the Court may make an order sanctioning a banking business transfer scheme, the proposed scheme must first satisfy the definition of a banking business transfer scheme in s.106(1), which sets out three requirements: the scheme must satisfy one of the conditions in s.106(2), must be one in which the whole or part of the business to be transferred includes accepting of deposits and must not be an excluded scheme.

9. This scheme satisfies the condition in s.106(2)(b) i.e. the whole or part of the business carried on in the UK by an authorised person who is not a UK authorised person but who has permission to accept deposits (the transferor concerned) is to be transferred to another body which will carry it on in the UK (the transferee). The other requirements in section 106(1) are also satisfied.

10. Section 107 FSMA provides the mechanism by which an application may be made to the Court to sanction, inter alia, a banking business transfer scheme and s.110 provides that on an application under s.107, certain persons and entities are entitled to be heard.

In respect of this scheme, this includes the FCA, the PRA and any person who alleges that he or she would be adversely affected by the carrying out of the scheme.

11. Then s.111(1) sets out the conditions which must be satisfied before I can make an order sanctioning this banking business transfer scheme. There are two: first, the court must be satisfied that the appropriate certificate has been obtained. For this type of scheme, the appropriate certificate is specified in Schedule 12 of FSMA as being a certificate given by the relevant authority, which is the PRA. I have been shown the relevant certificate from the PRA which is dated 27th July 2023 and which certifies that LHV UK (i.e. the transferee) possesses or will possess before the Scheme takes effect, adequate financial resources.

12. The second condition is specified in s. 111(3) which provides '*The court must consider that in all the circumstances of the case, it is appropriate to sanction the scheme.'* Unsurprisingly, there is some case law on how the Court should exercise this discretion and Mr Moore has drawn my attention to how this case law has developed over time.

13. The starting point reaches back into case law concerned with the long-established jurisdiction of the Court to sanction the transfer of long-term insurance business and the passages usually cited are from the unreported Judgment of Hoffmann J in ***Re London Life Association Ltd,*** 21 February 1989 and the later decision of Evans-Lombe J in ***Re AXA Equity & Law Life Assurance Society and AXA Sun Life PLC*** [2001] 1 All ER (Comm) 1010. It was Henderson J. in ***Re Alliance & Leicester Plc*** [2010] EWHC 2858 (Ch) who drew on those two cases to formulate 'the relevant principles which can and should be applied by way of analogy in considering whether an application of this sort should be approved' i..e. a banking business transfer scheme, which he set out in [44]-[48].

14. As Mr Moore submitted, that formulation requires some adaptation in the light of the decision of the Court of Appeal in ***Re Prudential Assurance Company Limited*** [2020] EWCA Civ 1626 see, in particular, at [79]-[86]. The Court of Appeal had detected a tendency to treat the judgments of Hoffmann J and Evans-Lombe J as if they were a comprehensive statement of the factors which should be applied by the Court in all insurance business transfers, but the Court was at pains to stress that the factors which require consideration depend on the circumstances of the case. It then set out at [80]-86] at a more general level, the evaluations which the Court was required to carry out before deciding to sanction (in that case) an insurance business transfer.

15. Transposing that approach to the circumstance of a banking business transfer scheme, it is clear that a crucial question is whether the proposed scheme will have any material adverse effect on the persons affected by the scheme. In ***Re ING Direct NV*** [2013] EWHC 1697 (Ch) David Richards J. emphasised the importance of the security of the rights of depositors.

The power to make ancillary orders

16. Section 112(1)(d) FSMA enables the Court to make orders:

> '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.'

17. Mr Moore submitted that there have been some differences of judicial opinion on the precise ambit of this power, in particular, the width of the Court's powers under s.112(1)(d) and the overlap with the scheme. On this point he drew my attention to a passage in the Judgment of Henderson J in ***Re Alliance & Leicester***:

> "32. It appears by now to be fairly well settled, and certainly it is my own view, that the word "necessary" in this context does not mean "indispensable", but rather means something falling between indispensable and desirable. In addition, the word has to be read in the context of the phrase as a whole, so that if a step is necessary in order to implement the scheme in an effective and commercially sensible way, it will be perfectly proper to make an order under section 112 for that purpose."

18. He contrasted that with a passage in the judgment of Lindsay J in ***Re Norwich Union Linked life Assurance Limited*** [2004] EWHC 2802 (Ch) at [11] –[12] where he said that proponents of a scheme could either put such provisions in the scheme which therefore become subject to the full rigour of the approval and sanction process or as an ancillary order, or as here, in effect, invoke both jurisdictions.

19. Finally, Mr Moore drew my attention to the most recent decision on the ambit of s.112 in ***Re Barclays Bank Plc*** [2018] EWHC 2868 (Ch). This was another case where the proposed scheme was designed to provide continuity of service provision to clients in the EEA following Brexit. In very brief summary, the purpose of the proposed scheme was to transfer the relevant parts of the businesses of two subsidiaries in the Group, Barclays Bank ("BB") and Barclays Capital Securities Ltd ("BCSL"), relating to EEA clients to Barclays Bank Ireland ("BBI") which would continue to be authorised to conduct business in the EEA post-Brexit. BB was authorised to accept deposits and, as I understand the report, the relevant part of its business was the subject of the proposed scheme. The complication came with BCSL which was not licensed to accept deposits but was authorised to conduct a variety of investment business and had permission under MiFID2 to carry out business on the basis of freedom of services across the EEA. In that case Zacaroli J. was asked (effectively at the directions stage) for guidance as to whether s.112(1)(d) gave the Court jurisdiction to order (at the sanction hearing) that the business of BCSL be transferred to BBI.

20. None of the existing case law addressed this question, so Zacaroli J. addressed it from first principles. Having done so, he ruled that the order sought was capable of falling within s.112(1)(d) on the bases that:

    i) At [46], the limitations on the scope of orders that can be made under s.112(1)(d) are to be found within the provision, namely that the order must be incidental, consequential or supplementary to the scheme and must be necessary to secure that the scheme is fully and effectively carried out.

    ii) At [53], the transfer of BCSL's business was 'necessary', on evidence (summarised in [14]) that there was a high degree of interconnectedness between BB's and BCSL's investment banking products and services provided to clients; that in broad terms there was one overall business, operated out of both BB and BCSL; and that BCSL did not operate as a standalone business but

was used as an entity through which certain transactions, managed by BB employees, were executed.

iii) At [56], the transfer of the business of BCSL could be described as 'consequential' or 'supplementary'.

21. The facts before me are much more straightforward. The Judgment of Zacaroli J. nonetheless provides comfort that the technical amendments here are well within the ambit of s.112(1)(d).

Application to the Facts.

22. I have already mentioned the Notice which is required to be published by the Regulations. In fact, the evidence establishes that the Claimants went considerably further than the formal requirements to notify clients and other interested parties of the Scheme and the Court process. Detailed training was given to the UK relationship managers as to how to execute the communication programme and how to log and handle responses.

23. Mr Kitter summarises the results of the communication exercise in his second witness statement. Only a small number of queries were received, some nine in total. Six of those were raised by Pay.UK (which is one of the Transferring Suppliers, as defined by the Scheme) and all six have been resolved to the satisfaction of Pay.UK which has expressly and definitively confirmed to LHV that their queries were not intended to be and should not be construed as being any objection to the scheme. However, a technical amendment to the Scheme will be required (under paragraph 15.2) after the Scheme has been sanctioned in its current form. These amendments concern the proposed transfer of its memberships of the Faster Payments Service payment system and the BACS payment system and have been agreed between the Claimants and Pay.UK. The amendments are set out and explained by Mr Kitter in his second witness statement and I need not burden this judgment with the details.

24. Mr Kitter explains that it is not practicable to delay the date the scheme becomes effective (should it be sanctioned) and thus, due to the 30-day review period afforded to the PRA and the FCA under paragraph 15.2 the scheme cannot be sanctioned in its amended form. In accordance with the process for implementing technical amendments pursuant to paragraph 15.2 the PRA and FCA were duly notified of the proposed technical amendments on the 8th of August 2023 and have not communicated any concerns in relation to the proposed amendments.

25. Indeed, the evidence establishes that the PRA and the FCA have been involved in the review of the documents involved in the Scheme at all stages, and, neither have taken the opportunity to appear at this hearing. Nor, I should add, has any other person appeared to register any objection to the Scheme.

26. I have considered the technical amendment proposed to the Scheme. In this case, the Claimants invoke both jurisdictions I mentioned above in that, in effect, I am being asked to sanction the Scheme as it will be amended. I am entirely satisfied that the scheme should be sanctioned in its current form (for the reasons I set out below) and that the technical amendments will follow subject to the paragraph 15.2 procedure.

Decision to Sanction

27. Having considered all the matters put before me I conclude that this Scheme is one which I should sanction, for the following reasons by way of brief summary:

    i) It gives effect to a reasonable commercial objective, which is the subsidiarisation of LHV's UK branch;

    ii) There has been close co-operation with, and oversight by, the PRA in the development of the Scheme;

    iii) The Scheme is fully explained in the documents made available to those interested in accordance with the Court's orders;

    iv) There has been an extensive additional (voluntary) communication programme;

    v) No objections of any nature have been raised to the Scheme;

    vi) All statutory requirements in relation to the Scheme have been duly complied with in full; and

    vii) The ancillary orders are within the Court's jurisdiction and there is no reason not to make the orders, which are commercially desirable and in the interests of the transferring clients of LHV's UK branch.

28. Accordingly, for the reasons summarised in this Judgment I grant the Order in the terms sought sanctioning this Scheme.