Neutral Citation No: [2021] NIQB 38	*Ref:*	McF11465
	ICOS No:	20/071145
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	07/04/2021

Formatted Table

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

COMMERCIAL HUB

ULSTER BANK LIMITED

Transferor

-and-

NATIONAL WESTMINSTER BANK plc

Transferee

IN THE MATTER OF AN APPLICATION UNDER PART VII OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

Martin Moore QC and Peter Hopkins BL (instructed by Pinsent Masons solicitors) for the transferor and transferee

---

McFARLAND J

Introduction

[1] This is an application under Part VII of the Financial Services and Markets Act 2000 (as amended) ("FSMA") by Ulster Bank Limited for the court's sanction for a proposed transfer of its banking business to National Westminster Bank plc.

Statutory Provisions

[2] The relevant sections of, and Schedule to, FSMA and regulations made under FSMA, are set out below. The amended legislation now refers to PRA and FCA. 'PRA' is the Prudential Regulation Authority which is an arm of the Bank of England responsible for the regulation and supervision of banks, building societies, credit unions, insurers and major investment firms in the United Kingdom. 'FCA' is the

Financial Conduct Authority which is the conduct regulator for financial services firms and financial markets in the UK and also operates as a prudential supervisor for financial services firms. The PRA and FCA were both created in 2013 by the Financial Services Act 2012 and replaced the Financial Services Authority. For convenience I will also use these abbreviations.

(a) Section 106 of FSMA –

> *(1) A scheme is a banking business transfer scheme if it –*
>
> *(a) satisfies one of the conditions set out in subsection (2);*
>
> *(b) is one under which the whole or part of the business to be transferred includes the accepting of deposits; and*
>
> *(c) is not an excluded scheme or a ring-fencing transfer scheme.*
>
> *(2) The conditions are that –*
>
> *(a) the whole or part of the business carried on by a UK authorised person who has permission to accept deposits ("the transferor concerned") is to be transferred to another body ("the transferee");*
>
> *(b) …*
>
> *(3) …*
>
> *(4) For the purposes of subsection (2)(a) it is immaterial whether or not the business to be transferred is carried on in the United Kingdom.*
>
> *(5) "UK authorised person" has the same meaning as in section 105.*
>
> *(6) …*
>
> (7) …

(b) Section 107 -

> *(1) An application may be made to the court for an order sanctioning … a banking business transfer scheme ...*
>
> *(2) An application may be made by –*

(a) *the transferor concerned;*

(b) *the transferee; or*

(c) *both.*

(2A) *…*

(2B) *…*

(3) *The application must be made—*

(a) *…*

(b) *if the transferor concerned and the transferee are registered or have their head offices in different jurisdictions, to the court in either jurisdiction;*

(d) *…*

(4) *"Court" means—*

(a) *the High Court; or*

(b) *in Scotland, the Court of Session.*

(c) Section 108 -

(1) The Treasury may by regulations impose requirements on applicants under section 107.

(2) The court may not determine an application under that section if the applicant has failed to comply with a prescribed requirement.

(3) *The regulations may, in particular, include provision—*

(a) *as to the persons to whom, and periods within which, notice of an application must be given;*

(b) *enabling the court to waive a requirement of the regulations in prescribed circumstances.*

The Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 were made under section 108. Regulations 5 and 6 deal with transfers of banking businesses:

5. — (1) An applicant under section 107 of the Act for an order sanctioning a banking business transfer scheme ("the scheme") must comply with the following requirements.

(2) A notice stating that the application has been made must be published —

(a) in the London, Edinburgh and Belfast Gazettes; and

(b) in two national newspapers in the United Kingdom.

(3) The notice mentioned in paragraph (2) must —

(a) be approved by the appropriate regulator prior to its publication; and

(b) contain the address from which the statement mentioned in paragraph (4) may be obtained.

(4) A statement setting out the terms of the scheme must be given free of charge to any person who requests it.

(5) Copies of the application and the statement mentioned in paragraph (4) must be given free of charge to the appropriate regulator and, if the FCA is not the appropriate regulator, the FCA..

6. — (1) Subject to paragraph (2), the court may not determine an application under section 107 for an order sanctioning a banking business transfer scheme —

(a) where the applicant has failed to comply with the requirements in regulation 5(2) or (3); and

(b) until a period of not less than twenty-one days has elapsed since the appropriate regulator or the FCA was given the documents mentioned in regulation 5(5).

(2) The requirement in regulation 5(2)(b) may be waived by the court in such circumstances and subject to such conditions as the court considers appropriate.

(d) Section 110 -

(1) On an application under section 107 relating to … a banking business transfer scheme … the following are also entitled to be heard —

(a) *the FCA,*

(aa) *in the case of a scheme falling within subsection (2), the PRA, and*

(b) *any person (including an employee of the transferor concerned or of the transferee) who alleges that he would be adversely affected by the carrying out of the scheme.*

(2) *A scheme falls within this subsection if—*

(a) *the transferor concerned or the transferee is a PRA-authorised person, or*

(b) *the transferor concerned or the transferee has as a member of its immediate group a PRA-authorised person.*

(3) *…*

(4) *…*

(5) *…*

(e) Section 111 -

(1) *This section sets out the conditions which must be satisfied before the court may make an order under this section sanctioning … a banking business transfer scheme ...*

(2) *The court must be satisfied that—*

(a) *in the case of … a banking business transfer scheme, the appropriate certificates have been obtained (as to which see Parts I and II of Schedule 12);*

(aa) …

(ab) …

(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.

(f) Section 112 -

(1) If the court makes an order under section 111(1), it may by that or any subsequent order make such provision (if any) as it thinks fit—

(a) for the transfer to the transferee of the whole or any part of the undertaking concerned and of any property or liabilities of the transferor concerned;

(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 transferor concerned;

(d) with respect to such incidental, consequential and supplementary matters as are, in its opinion, necessary to secure that the scheme is fully and effectively carried out.

(2) An order under subsection (1)(a) may—

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

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

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

(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 transferor 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 transferor 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).

(3) If an order under subsection (1) makes provision for the transfer of property or liabilities—

(a) the property is transferred to and vests in, and

(b) the liabilities are transferred to and become liabilities of, the transferee as a result of the order.

(4) But if any property or liability included in the order is governed by the law of any country or territory outside the United Kingdom, the order may require the transferor concerned, if the transferee so requires, to take all necessary steps for securing that the transfer to the transferee of the property or liability is fully effective under the law of that country or territory.

(5) Property transferred as the result of an order under subsection (1) may, if the court so directs, vest in the transferee

free from any charge which is (as a result of the scheme) to cease to have effect.

(6) An order under subsection (1) which makes provision for the transfer of property is to be treated as an instrument of transfer for the purposes of section 770(1) of the Companies Act 2006 and any other enactment requiring the delivery of an instrument of transfer for the registration of property.

(7) …

(8) …

(9) …

(10) The transferee must, if [a] … banking business transfer scheme … is sanctioned by the court, deposit two office copies of the order made under subsection (1) with the appropriate regulator within 10 days of the making of the order.

(11) But the appropriate regulator may extend that period.

(12) "Property" includes property, rights and powers of any description.

(13) "Liabilities" includes duties.

(14) "Shares" and "debentures" have the same meaning as in the Companies Acts (see sections 540 and 738 of the Companies Act 2006).

(15) "Charge" includes a mortgage (or, in Scotland, a security over property).

(g) Schedule 12 Part II paragraphs 7 and 8 to FSMA -

7(1) For the purposes of section 111(2) the appropriate certificates, in relation to a banking business transfer scheme, are—

(a) a certificate under paragraph 8; and

(b) if sub-paragraph (2) applies, a certificate under paragraph 9.

(2) This sub-paragraph applies if the transferor concerned or the transferee is an EEA firm falling within paragraph 5(b) of Schedule 3.

8(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;

(aa) if the transferee is a person with Part 4A permission or with permission under Schedule 4 but is not a PRA-authorised person, the FCA;

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

(c) if the transferee does not fall within paragraph (a), (aa) or (b), the authority responsible for the supervision of the transferee's business in the place in which the transferee has its head office.

(4) In sub-paragraph (2), any reference to a transferee of a particular description of person includes a reference to a transferee who will be of that description if the proposed banking business transfer scheme takes effect.

[3] The requirement for court sanction under Part VII of FSMA relates to a number of different transfer schemes – insurance, banking, reclaim fund, and ring-fencing. The primary purpose of the sanction regime is to ensure that all regulatory requirements relating to a transfer have been complied with and for the court to ensure that the interests of policy holders, customers and other interested parties are sufficiently protected. Insurance and banking transfers have been subject to this requirement in earlier legislation. FSMA now requires court sanction for reclaim fund transfers (funds retaining money which had been credited to dormant bank accounts) and ring-fencing fund transfers (funds that are required to be ring-fenced under the provisions of Part 9B of FSMA, as inserted by the Financial Services (Banking Reform) Act 2013.)

[4] The Ulster Bank Limited transfer scheme is a banking transfer scheme.

Legal principles when applying section 111(3) of FSMA

[5] In what is considered to be the only occasion in which the Court of Appeal has determined an issue under section 111(3) of FSMA (or predecessor legislation), guidance has been given in *Prudential Assurance Company Limited and Rothesay Life plc* [2020] EWCA Civ 1626. Vos LJ commented at [31] that:

> *"Although Part VII contains provisions particular to each type of transfer scheme, the exercise by the court of its discretion to sanction any type of scheme is ultimately subject to the same broadly-expressed statutory criterion in section 111(3) that 'in all the circumstances of the case, it is appropriate to sanction the scheme.'"*

[6] In *Prudential Assurance* the court was dealing with an insurance business transfer. In general terms the approaches by Hoffman J in *London Life Assurance Limited* (21 February 1989, unreported) and Evans-Lombe J in *Axa Equity & Law Life Assurance plc and Axa Sun Life plc* [2001] All ER 1010, when dealing with insurance business transfers were considered to be appropriate. Evans-Lombe J at [6] distilled the approach to insurance business transfers into eight principles:

> "*(1) The 1982 Act confers an absolute discretion on the Court whether or not to sanction a scheme but this is a discretion which must be exercised by giving due recognition to the commercial judgment entrusted by the Company's constitution to its directors.*
>
> *(2) The Court is concerned whether a policyholder, employee or other interested person or any group of them will be adversely affected by the scheme.*
>
> *(3) This is primarily a matter of actuarial judgment involving a comparison of the security and reasonable expectations of policyholders without the scheme with what would be the result if the scheme were implemented. For the purpose of this comparison the 1982 Act assigns an important role to the Independent Actuary to whose report the Court will give close attention.*
>
> *(4) The FSA by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on whether policyholders are likely to be adversely affected. Again the Court will pay close attention to any views expressed by the FSA.*
>
> *(5) That individual policyholders or groups of policyholders may be adversely affected does not mean that the scheme has to*

be rejected by the Court. The fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected.

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

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

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

[7] Banking transfers will involve different considerations with regard to the relationship between the company and its customers. The expectations of customers may well be different to the expectations of policyholders of life insurance, with profits and pension policies. Some basic core considerations are common to both. This is reflected in the judgments of Henderson J in *Alliance & Leicester plc and Santander UK plc* [2010] EWHC 2858 and Snowden J in *Barclays Bank plc and Barclays Bank Ireland plc* [2019] EWHC 129. Henderson J in *Alliance & Leicester plc* stated at [44]–[48]:

"44. The principles which can, and it seems to me should, be applied by way of analogy are briefly as follows. First, the relevant Act (in the present context, the 2000 Act) confers an absolute discretion on the court whether or not to sanction the scheme, but the discretion is one which must be exercised by giving due recognition to the commercial judgment entrusted by the constitution of the relevant company to its directors.

45. Secondly, the court is concerned whether an interested person or any group of interested persons will be adversely affected by the scheme. That, it seems to me, must be right, and is reflected in section 110 of the 2000 Act to which I have already referred. Indeed, this is the aspect of the matter to which I have been directing most of this judgment.

46. Thirdly, the FSA, by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on whether, in the present case, investors or other persons holding products with Alliance & Leicester are likely to be adversely affected, and the court will pay close attention to any views the FSA may express. I have already explained that the FSA has been closely involved in these proposals and is plainly content with them because it has granted the necessary certificates and has not exercised its right to be represented at the hearing.

47. Fourthly, and this is, I think, an important point, individual investors or holders of products may be adversely affected, but that does not necessarily mean that the scheme has to be rejected by the court. The fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected.

48. Also of importance is the following principle. It is not the function of the court to produce what, in its view, is the best possible scheme. As between different schemes, all of which the court may deem fair, it is for the directors to choose which one to pursue; and, by the same token, the details of the scheme are not a matter for the court, provided that the scheme as a whole is found to be fair. The court will not, therefore, amend the scheme merely because it thinks that individual provisions could be improved upon."

[8] I would not wish to add to this approach, save to observe that with the creation of the PRA and FCA in 2013, references by Henderson J to the FSA should be substituted with references to PRA and FCA. Both the PRA and FCA are notice parties to these types of applications and are bodies that the court would expect to have a valid informed opinion should they wish to express it.

[9] Before leaving the case-law, I would observe that both the *Alliance & Leicester plc* and the *Barclays Bank* cases were, like this application, proposed transfers within a wider banking group. *Alliance & Leicester* is very similar to this application. *Barclays Bank* is more nuanced as it was a transfer relating to banking services in the Republic of Ireland and which endeavoured to prepare for the United Kingdom leaving the European Union and the proper separation of its various functions under what was anticipated to be, and now is, two different regulatory regimes.

The proposed banking transfer scheme

[10] The Ulster Bank is a long established bank in Ireland. It began business in the early 19th century. In the early 20th century it was taken over by the London County and Westminster Bank, and by virtue of various further transfers it is now part of the

NatWest Group. The ultimate holding company is NatWest Group plc which is a public limited company incorporated in Scotland and is listed on the London Stock Exchange. The group's primary public interface includes the retail banks – Ulster Bank, Royal Bank of Scotland and National Westminster Bank, abbreviated to NatWest Bank. Previously Ulster Bank had a cross border presence, and although that name is maintained in the Republic of Ireland, the banks north and south of the Irish border are separate legal entities, Ulster Bank Limited (in Northern Ireland) and Ulster Bank Ireland DAC (in the Republic of Ireland). Both are banks within the NatWest Group.

[11] The proposed transfer will transfer the banking business currently conducted by Ulster Bank Limited (a company incorporated in Northern Ireland) to National Westminster Bank plc (a company incorporated in England & Wales). That banking business consists of the retail and premier banking, and the commercial, corporate and business banking of Ulster Bank Limited, including the customer accounts and all associated activities, rights, undertakings, assets and liabilities. After the proposed transfer National Westminster Bank plc intends to continue the banking business currently undertaken by Ulster Bank Limited and will continue to use the trading name "Ulster Bank."

[12] The transfer will not involve in any way the banking business currently undertaken by Ulster Bank Ireland DAC.

[13] Customers who currently bank with Ulster Bank Limited are not likely to notice any significant changes in their relationship, particularly as the existing branding and branch network are being maintained.

The court hearings

[14] The court convened a directions hearing on 12 November 2020 and a review hearing on 1 March 2021. The purpose of the directions hearing was to make directions for the publicising of the application and to timetable the matter for the hearing. The review hearing was primarily to make preparations for the hearing in light of the ongoing coronavirus pandemic. The hearing took place on the 25 March 2021 and was convened under the provisions of Schedule 27 to the Coronavirus Act 2020. It took the form of a 'hybrid' hearing. The court clerk and I were present in court. Junior counsel for the Ulster Bank Limited was present together with two members of Pinsent Masons his instructing solicitors, a representative of the bank, and one of the objectors. Senior counsel for the bank attended remotely, as did the other objectors and other representatives of Pinsent Masons and the transferor bank and the transferee bank. I am satisfied that the proceedings were conducted in a manner that allowed all interested parties to participate fully in the hearing. No issue was taken by any party concerning any inability to participate.

Communication strategy for the transfer scheme

[15] The FSMA regulations (see [2] (c) above) state that a notice must be approved by the PRA and must be published in the London, Edinburgh and Belfast Gazettes and in two newspapers circulating within the United Kingdom. Approval for the advertisement was obtained from the PRA and it was published in the three Gazettes on 24 November 2020. It was also published on that date in the Times and Daily Mail newspapers (satisfying the national circulation condition) and in addition in the Belfast Telegraph, Irish News and the Scottish Daily Mail.

[16] Unlike an insurance business transfer, the FSMA regulations do not require specific notice of the application and hearing to be sent to a banking customer. FSMA does permit any person who thinks that they may be adversely affected by the transfer to make written and/or oral representations to the court, and it has been long recognised that any communication strategy to inform a bank's customers and others about such a transfer must be appropriate and effective. Sir Geoffrey Vos C in *Re Barclays Bank plc and another* [2017] EWHC 1482 when dealing with four ring-fencing transfer schemes at [28] – [30] gave some guidance as to communication strategies emphasising that it is not for applicants to determine who may or not be affected:

> "27. *Section 110(4) of FSMA provides that, as I have said, "any person ("P") ... who alleges that P would be adversely affected by the carrying out of the scheme", is entitled to be heard on the court application for sanction of the RFTS.*
>
> 28. *In these circumstances, it seems to me that it is not for the banks to limit notification of their schemes to persons who they have determined are likely to be adversely affected by the scheme. The statutory framework for potential objections suggests that anyone who might wish to allege that he would be adversely affected by the carrying out of the scheme ought to be notified of it. It may be for consideration in the future whether "anyone who might wish to allege that he would be adversely affected by the carrying out of the scheme", can only include a person who might reasonably allege, or might reasonably wish to allege that he would be adversely affected by the scheme.*
>
> 29. *Obviously it is no part of the court's purpose to encourage applications from unreasonable objectors. Nonetheless, in my judgement, it is at least important that anybody who might have a reasonable contention that they would be adversely affected is able to make their point at the appropriate stage in these proceedings.*

> 30. *In saying what I have said, I recognise that in the light of the indications from the FCA and the PRA in setting out the potential range of persons who might be likely to be adversely affected, and since the banks have not asked the court to determine at this stage whether any particular person or group can or should be excluded from notification, it is possible that the net will have to be spread fairly wide …"*

[17] In an affidavit sworn on the 26 February 2021, Katie Murray, the Chief Financial Officer of the NatWest Group and a director of the Ulster Bank Limited set out in detail how the Ulster Bank Limited had mailed to customers Transferor Notification Packs based on contact data held by the bank during the period 2 November 2020 and 17 November 2020. The mailing commenced on 16 November 2020 and was concluded by 30 November 2020. In all 570,763 packs were dispatched to retail customers and 41,752 to commercial customers. In addition 15,515 packs were dispatched by email to commercial customers.

[18] Large print, braille and audio packs were also available on request, and 568 (large print), 51 (braille) and 5 (audio) requests were received and dealt with.

[19] Details of the scheme were also made available on the internet and readily accessible to internet users accessing the websites of Ulster Bank Limited and National Westminster Bank plc.

[20] Third parties, such as landlords, tenants, suppliers, correspondent banks and solicitors, which had third party agreements with Ulster Bank Limited were contacted directly.

[21] 10,755 packs had been returned through the mail as undelivered, representing 1.75% of the total. This figure is stated to be standard for the banking business in the context of customers for whom the bank does not hold correct up to date addresses.

The objections

[22] The court received seven actual objections. Six communicated directly with the court, and a further one submitted his objection through another objector. Four made oral representations to the court, one in person and three remotely by video live link. There was one further letter which requested an adjournment of the hearing to enable the solicitors for the author of the letter to prepare a submission. The court assumes that the author of the letter was an intended objector although no actual detail of the objection was set out. For the purposes of the hearing, the author of the letter was treated as an objector. I do not propose to name any of the objectors in this judgment in order that their privacy will be protected.

The Court's approach to objections generally

[23] Before dealing with the specific details of the objections, I will set out a few observations as to how the court should approach objections to banking schemes.

[24] Section 110 of FSMA sets out who is entitled to object and to be heard. It includes "*any person who alleges that he would be adversely affected by the carrying out of the scheme.*" This is, of course, a very low bar given the subjective nature of the wording, and the court should be slow to deny any person the right to make submissions to the court.

[25] The court should consider, as best it can, the nature of the objection from the information made available to it by the objector. It should also take into account any submissions made on behalf of the transferor and the transferee and any notice party together with all the other evidence submitted to the court. The court's focus should be on whether the objector will in fact be affected by the scheme, and if so whether the affect would be adverse. One could conveniently call this the 'day after' test, in other words - How will the position of the objector have been affected by the transfer on the day after the transfer?

[26] Should the court consider that any objector would be adversely affected, that may lead to further enquiries such as - how the transferor, and particularly the transferee, intend to ameliorate any impact.

[27] It is also highly likely that the transferor and transferee will have already identified groups of individuals who may be adversely affected by the transfer scheme and may have already made provision for them in the scheme. The court should endeavour to determine whether any particular objector, or cohort of objectors, can take advantage of these provisions.

[28] Even if it is likely that there will be no, or little, amelioration of the adverse impact on any objector, that is just one of the factors that the court should take into account when determining whether or not to sanction the scheme.

[29] Richards J's observations in *Re ING Direct NV* [2013] EWHC 1697 at [9] are of particular relevance:

> *"The issue for the court in relation to the transfer of banking business, as I see it, is primarily whether the interests of those affected – in this case depositers and mortgage borrowers – will be adversely affected by the transfer and, if they will be, whether there are sufficient mechanisms put in place in relation to such adverse changes as to make it appropriate to sanction the scheme. It is not, I think, the case that it would never be appropriate for the court to sanction a business transfer if there were some adverse change to the position of those affected. It*

> *must inevitably be a question of degree and judgement in the particular circumstances of the case."*

He then continues at [10] to state that the transfer of a banking business is not a transfer which would generally require any benefit to be conferred on those whose interests are being transferred.

[30] I now turn to the actual objections. Of the eight objections, two were resident in Northern Ireland and the other six were resident in the Republic of Ireland.

Refusal to adjourn

[31] One of the Northern Ireland based objectors sent a short letter from which I inferred that he was a customer of Ulster Bank Limited and was making generalised, unspecified, objections. The main thrust of the letter, which was received shortly before the hearing, was an application to adjourn the hearing to enable his solicitors to prepare an objection. There was no personal appearance by this objector at the hearing, and based on his written application I declined to adjourn the case as there had been a period of approximately four months available to this objector to submit a substantive objection. Without giving any detail, the court was compelled to reject the application to adjourn. I consider that there was no evidence before the court that this objector would be adversely affected by the transfer.

The merits of the objections

[32] Of the remaining seven objectors, only one is a customer of Ulster Bank Limited. The other six appear to be, or have been, customers of Ulster Bank Ireland DAC, the company incorporated and trading in the Republic of Ireland. To understand the exact position in relation to the banking group, I will briefly set out the detail. The overall owner of the banking group is NatWest Group plc (incorporated in Scotland number SC045551). It wholly owns NatWest Holdings Limited (incorporated in England and Wales number 10142224). NatWest Holdings Limited wholly owns National Westminster Bank plc (incorporated in England and Wales number 00929027) which in turn wholly owns Ulster Bank Limited (incorporated in Northern Ireland number R0000733). (Companies which trade in different jurisdictions may be required to register as 'foreign' companies in other jurisdictions and therefore they may have other company numbers allocated by those jurisdictions. These additional numbers can add confusion but are not relevant to the identification of the company.) Ulster Bank Ireland DAC is a company incorporated in the Republic of Ireland (number BR014002). It, like National Westminster Bank plc, is a wholly owned subsidiary of NatWest Holdings Limited.

[33] In simple terms, Ulster Bank Limited and Ulster Bank Ireland DAC, despite sharing a name and brand, are only related companies within the same banking group. They are two distinct and separate banks and legal entities. As much of the

detail concerning the objections has focussed on litigation, in this context litigation against Ulster Bank Ireland DAC must be pursued against that company, and if successful, must be enforced against Ulster Bank Ireland DAC. The litigation has nothing to do with Ulster Bank Limited, the transferor in this matter.

[34] The seven remaining objectors fall into three categories. The first, comprising of one objector, would be an Ulster Bank Limited customer pursuing a claim against Ulster Bank Limited. The second, also comprising of one objector, would be an Ulster Bank Ireland DAC customer pursuing a claim against Ulster Bank Limited. The third category, comprising five objectors, would be Ulster Bank Ireland DAC customers pursuing claims against Ulster Bank Ireland DAC.

[35] All the objectors appear to have issued proceedings, or are contemplating proceedings, in Belfast or Dublin.

[36] The objectors have set out in varying details the nature of their complaints and legal proceedings. It is not the function of this court to determine, in any manner, the appropriate outcome of those proceedings, or to speculate as to any possible outcome. It is also important to bear in mind what has been set out above in relation to this court's function and what I have described as 'the day after' test. I have no doubt that each of the objectors perceive that they have been adversely affected by the turn of economic events in the late 2000s, and that those perceptions are grounded in reality. All appear to have been borrowers from either Ulster Bank Limited or Ulster Bank Ireland DAC, and, like many others, the situation they found themselves in at that time, mainly due to an inability to repay their debts and the collapsing value of any security they could offer, has created an immense difficulty for them financially, commercially, and personally. My function is not to determine how, or why, each objector has been affected. It is to determine whether each, or any, of the objectors will be adversely affected by the transfer of the Ulster Bank business.

The Ulster Bank Limited customer

[37] Turing to the three categories of objector. The first is the Ulster Bank Limited customer pursuing a claim against Ulster Bank Limited. That claim will still persist after the transfer, and, if it is successful, can be enforced against National Westminster Bank plc. In this context, the transfer of any potential liability pursuant to the litigation from the transferor (with gross assets of £11.2 billion and net assets of £500 million) to the transferee (with gross assets of £311 billion and net assets of £18 billion) could be seen as a positive outcome, and in no way adverse to this objector's interests.

[38] This objector also raised certain discrete issues which may or may not have any relevance to his ongoing litigation, but for completeness I will briefly deal with them.

[39] The objector complained that he, or others in his position, may now be faced with a situation of having to pursue litigation in Great Britain as opposed to Northern Ireland, adding to expense and inconvenience. His main concern appears to arise from his existing litigation and attempts by some defendants in that litigation (not Ulster Bank Limited) applying to the court for an order that the claim against those defendants could not be pursued before the Northern Irish courts. Should plaintiffs choose to sue defendants in relation to business carried on outside Northern Ireland that is always a risk, however the risk is not increased, or reduced, by the transfer. Neither the transferee nor the transferor can bind the position of any other party, the objector, or others, decide to sue. As for the transferee, the Scheme document at 4.1.1 specifically deals with the position in relation to any proceedings commenced or continuing against the transferee. It states that the transferee "shall not … raise any challenge to jurisdiction which arises."

[40] In any event, the general rule in relation to jurisdiction is that claims are normally dealt with by the courts of the jurisdiction agreed between the parties in any contract, or if the contract is silent, where the contract was formed or has been operational. If the claim is in tort, then where the cause of action arose, or if in relation to land, where the land is situate. These are generalised statements with regard to jurisdiction and each case will be determined on its own facts. Should any litigation arise in the future in relation to the transferor's or the transferee's banking operations in Northern Ireland, arising out of events occurring either before or after the transfer, it would be a very rare occurrence for a court in Northern Ireland to decline jurisdiction.

[41] Many banks based and incorporated in Great Britain or elsewhere, provide banking services in Northern Ireland (as indeed do companies operating other businesses) without any perceived difficulty in relation to jurisdiction.

[42] This objector also raises a point concerning which law will be applied in the determination of the litigation. The contract documents he specifically referred to stated that the law of Northern Ireland would apply. That means that wherever any litigation is conducted concerning that contract, the law of Northern Ireland will be applied by the court, even if that court is outside Northern Ireland. In any event Northern Ireland contract law is virtually identical to contract law in England and Wales.

[43] One final objection raised by this objector is the provision in certain contract documents concerning assignment. Several documents were produced but for convenience I will refer to a Fixed Rate Term Loan Facility Letter of 10 December 2008 to a limited liability company (the liabilities of which are partially guaranteed by this objector). Paragraph 10 provides that:

> "the Bank shall have the right to assign or transfer the benefits or obligations of the facility … to another entity within the Ulster Bank Group and may with the

> Borrower's prior consent, assign or transfer the benefits or obligations to any person not within the Ulster Bank Group."

The objection is that the Ulster Bank Limited, as asserted by the objector, cannot transfer the benefit of this loan facility letter to the transferee, without the objector's consent.

[44] I will deal with this briefly. The objection is based on the premise that the transferee, the parent company of Ulster Bank Limited, is not in the Ulster Bank Group. The objector asserts that Ulster Bank Group means Ulster Bank Limited and Ulster Bank Ireland DAC. The letter itself does not define Ulster Bank Group. Any court which is required to interpret the document will consider the intention of the parties in 2008 when the contract was entered into. The objector's assertion seems to be based on a financial document created in 2015. It is not for this court to go into the arguments relating to this point, suffice to say:

a) The objector has not articulated to the court, in writing or by oral submission, how he will in any way be adversely affected by the assignment of the Facility Letter to the transferee, save that he asserts it would override his ability to not consent to the assignment;

b) It would be open to a court to interpret 'Ulster Bank Group' to include the transferee (the parent company of Ulster Bank Limited);

c) The Scheme document provides at paragraph [8] for the transfer of any security interest to the transferee. At paragraph [11] provision is made that in the event of an asset that is incapable of being transferred for any reason the transferor will hold the asset in trust for the transferee. In other words it will retain legal ownership of the asset and will transfer the equitable interest in the asset to the transferee. As the transferor is retaining ownership of the asset no consent from the objector is required;

d) In any event, section 112 (2A) of FSMA allows for the court to make provision in an order "for a transfer of property or liabilities to take effect as if there were no such requirement to obtain a person's consent."

[45] The withholding of consent, should it be required, would be a tactical device and for no real practical benefit to the objector.

The Ulster Bank Ireland DAC customers

[46] I turn next to the objector who is, or was, a customer of Ulster Bank Ireland DAC and is suing Ulster Bank Limited. It would appear that the main complaint is against Ulster Bank Ireland DAC but the litigation appears to be based on the fact that an employee of Ulster Bank Limited may have sworn an affidavit in other

litigation against this objector. It is difficult to perceive how liability for the amount the objector says is due to him can attach to Ulster Bank Limited. In any event, that will be for the Dublin courts to determine. Should this objector be successful in his litigation then any amount ordered to be paid by Ulster Bank Limited will become payable by National Westminster Bank plc. The transfer scheme does not in any way impact on this objector. Whatever claim he may have against Ulster Bank Limited continues to subsist and his right to enforce a successful court order will not change.

[47] This objector also raised certain complicated issues concerning how Ulster Bank Ireland DAC calculated its interest rates, which I assume relates to the interest rates charged to this objector. Insofar as this is in any way relevant, it has nothing to do with the transfer as it relates to the relationship between Ulster Bank Ireland DAC and this objector.

[48] Finally, this objector raised issues about the impact that this transfer will have on his human rights, which I assume refers to his Article 1 First Protocol rights ("A1P1" rights) in relation to his property and potentially his Article 8 rights in respect of his right to respect for his private and family life. The right to ownership and enjoyment of private property has long been accepted at common law (see *Entick v Carrington* (1765) 19 State Tr 1029 at 1060:

> "*That right is sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole*").

The provisions of A1P1 state:

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*"

[49] Two points arise. Firstly, this objector has not indicated that he has any possessions the peaceful enjoyment of which will be interfered with by this banking transfer. Secondly, even if he had such possessions, a court sanctioning of this banking scheme could not interfere with his right of enjoyment, or be in any way a confiscation of these possessions. Richards J in *Re ING Direct NV* cited with approval the observations of Lloyd J in *Re Equitable Life Assurance* [2002] 2 BCLS 510. That case was a transfer of an insurance business under earlier legislation, but Lloyd J was clear that no arrangement capable of court approval under that legislation could in his view amount to a confiscation such that A1P1 would be infringed.

[50] No evidence has been placed before the court as to how this objector's Article 8 rights are likely to be infringed by the banking transfer. Insofar as this objector's

private and family life have been impacted we are speaking of events which occurred in the aftermath of what can be described as the 'banking crisis' in the late 2000s and can be connected to consequences arising from it. It involved his relationship with Ulster Bank Ireland DAC. This transfer will have no impact on his private or family life. The 'human rights' point this objector raises is without merit.

[51] I turn finally to the largest group of objectors, those customers of Ulster Bank Ireland DAC who are pursuing remedies against Ulster Bank Ireland DAC in the Dublin courts. They are in no way impacted by this transfer. Ulster Bank Ireland DAC carries on a banking business in the Republic of Ireland and it will continue to do so. That business is not being transferred by this scheme and everything remains the same. Whatever liabilities Ulster Bank Ireland DAC has in relation to ongoing litigation are not affected.

[52] One additional point raised by some of this cohort of objectors is that they claim that Ulster Bank Ireland DAC has been transferring assets out of that company and into Ulster Bank Limited. Expressions such as "asset stripping" have been used. This, they argue, has prejudiced them in relation to their litigation.

[53] I make no comment about what they claim has happened. Insofar as anything of this nature has happened the transfer of the assets has already taken place, so the transfer of the banking business from Ulster Bank Limited to National Westminster Bank plc will have no bearing on it. As far as these objectors are concerned it should be understood that a borrower from a bank (and all appear to fall into this category) has no assets in that bank. It is the bank that holds the assets. If the bank has transferred any of its assets inappropriately and these objectors believe that they have suffered as a result, then it will be open for them to seek such remedy that they feel is available to them. The main focus of the objections appears to be that the assets of Ulster Bank Ireland DAC have been transferred to Ulster Bank Limited and such assets are now to be transferred to National Westminster Bank plc. None of the objectors have shown how this will adversely affect them.

[54] In conclusion, I consider that none of the objectors who have contacted the court have provided evidence that they will be adversely affected by this transfer. In addition, I have not been able to identify other people who may be in the same or similar positions to these objectors, and who may be adversely affected. They are all actual, or aspiring litigants. Their litigation will continue and they can issue fresh proceedings if they so desire. The prospects of success in that litigation will not be adversely affected by the transfer. Their ability to recover damages, should they be successful in the litigation, will not be adversely affected by the transfer.

Dual-banked customers

[55] The transferor and transferee had correctly identified a number of people who could be adversely affected, namely dual-banked customers, either as savers or borrowers. These dual-banked customers, being customers of both Ulster Bank

Limited and National Westminster Bank plc could be adversely affected by the proposed transfer in a number of ways:

(a) As there will be one regulated legal banking entity after transfer, the coverage under the Financial Services Compensation Scheme ("FSCS") will be capped at the current rates, which are £85,000 for a single account and £170,000 for a joint account. Customers of both banks currently enjoy protection at these rates for Ulster Bank deposits and also for National Westminster Bank deposits. The FSCS is the United Kingdom's statutory compensation scheme for customers of authorised financial services firms. For example, if a customer has a deposit of £80,000 in the Ulster Bank and a deposit of £80,000 in the National Westminster Bank, he or she has currently full FSCS protection as both sums are under the cap. After transfer, with a total of £160,000 deposited with National Westminster Bank, the protection over the current cap of £85,000 would be lost. The protection would only become applicable should National Westminster Bank become insolvent that it could not meet its obligations to its depositers.

(b) In certain circumstances customers who have borrowed money from Ulster Bank and have cash deposits with, or have granted a charge on assets to, National Westminster Bank, may find their cash deposits or assets at risk should they default on their Ulster Bank loan. Similarly, assets held with, or secured to, Ulster Bank may be at risk should the customer have a loan from National Westminster Bank, and default. In simple terms this would mean that an Ulster Bank customer who has a loan from that bank and has a deposit account with National Westminster Bank, should the customer default on the Ulster Bank loan after the transfer, the deposit held by National Westminster Bank could be set-off against the amount due. Additionally, if National Westminster Bank hold an 'all monies' charge on assets in the ownership of the customer, the debt owing on the Ulster Bank loan would become secured by that charge.

I am satisfied that adequate provision has been made to mitigate any potential impact. Under the FSCS scheme some savers may lose protection for their savings, but there is in place a plan to alert them to this issue and to allow them to withdraw deposits, or close, certain savings accounts without notice and without penalty to enable them to lodge the money with other banks. Similarly dual-banked customers who are borrowers are protected in respect of any savings currently held in the other bank in relation to set-off arrangements. If current arrangements permit the set-off there will be no change and set-off will continue to be available after the transfer. If it is not, National Westminster Bank will not be permitted to exercise its set-off rights for a period of three months after transfer, or if the savings are held on a fixed-term or promotional rate, whenever that term or promotional rate expires, whichever is the later. This would permit the customer to take such steps, including the closure of the deposit account or accounts, as the customer considers appropriate.

Conclusion

[56] The provision of section 111(3) FSMA requires me to consider all the circumstances of the transfer. I have done so. The publicity of the transfer and the court proceedings has been undertaken in accordance with the statutory requirements. I am satisfied that the people impacted by the transfer – customers, employees and interested third parties have been properly advised and in terms which are readily understandable. The scheme documents have been made available to them through direct notification.

[57] The transferor has therefore complied with its statutory obligation in relation to the adequacy of its communications (see section 108(1) of FSMA).

[58] The PRA has certified that National Westminster Bank plc, after taking into account the proposed transfer, will possess adequate financial resources (see section 111(2)(a) of, and Schedule 12 to, FSMA).

[59] National Westminster Bank plc is authorised by the PRA and is properly regulated by the PRA and the FCA. It can therefore properly take the transfer of the banking business of Ulster Bank Limited (see section 111(2)(b) of FSMA).

[60] The notice parties, the PRA and FCA, have not appeared before the court and have not lodged any written objections.

[61] I am satisfied that the matter has been properly considered by the respective boards of directors of the transferee and transferor. I am further satisfied that efforts have been made to identify parties who may be adversely affected by the transfer, to identify how they may be adversely affected and to put in place methods by which they can reduce or eliminate any impact on them. Those adversely affected parties have been notified and alerted to the position and the potential remedial action that can be taken.

[62] I have carefully considered each of the formal objections. They have been very small in number. Most of the objectors are not customers of Ulster Bank Limited, and of the two who were customers, only one produced an identifiable objection. This has to be seen in the context of a bank which has in excess of 600,000 customers. Despite being small in number, I have endeavoured to deal with the complaints as best I can. Despite their expressed concerns, none of the objectors will be adversely affected by the transfer scheme. I have not been able to identify any other customers (apart from the dual-banked customers) who in any way could be adversely impacted.

[63] I will therefore sanction the transfer scheme.

The Formal Order

[64] As for the precise terms of the order, it will include certain provisions relating to existing proceedings in Northern Ireland. The purpose is to facilitate the parties to these existing proceedings and enforcement of existing judgments. The primary purpose is to avoid legal costs and reduce delay. Schedule 3 to the order will include a list of court judgments which can be properly enforced by National Westminster Bank plc after the transfer (pursuant to Article 22 of the Judgments Enforcement (NI) Order 1981 and Rule 5 (1)(b) of the Judgment Enforcement Rules (NI) 1981). Schedule 4 to the order will include a list of proceedings before the High Court in Belfast whereby the name of the transferor shall be substituted by the name of the transferee, pursuant to Order 15 Rule 6 of the Rules of the Court of Judicature 1980, but with leave for any party to the proceedings to apply to the court in respect of such substitution.

[65] For completeness Schedule 1 to the order will include the Scheme and Schedule 2 to the order will include a summary of the Scheme.