JUDICIARY OF
ENGLAND AND WALES

2nd December 2020

IN THE MATTER OF THE PRUDENTIAL ASSURANCE COMPANY LIMITED

AND IN THE MATTER OF ROTHESAY LIFE PLC

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

JUDGMENT SUMMARY

Important note for press and public: this summary forms no part of the court's decision. It is provided so as to assist the press and the public to understand what the court decided.

Introduction

1. This case raised for the first time before the Court of Appeal the approach that the court should adopt in dealing with applications to sanction transfers of long-term insurance business under Part VII of the Financial Services and Markets Act 2000 ("FSMA"). Applications for the sanction of Part VII schemes, including insurance company transfer schemes, are a significant part of the work of the Insolvency and Companies List in the Business and Property Courts of England and Wales. It was rare for such applications to be refused.

2. On 16 August 2019, Snowden J exercised his discretion under section 111(3) of FSMA to refuse an application by the Prudential Assurance Company Limited ("PAC") and Rothesay Life Plc ("Rothesay") for the court to sanction the Scheme providing for the transfer from PAC to Rothesay of some 370,000 in-payment annuity policies written by PAC.

3. The judge refused sanction for two main reasons. First, despite the fact that PAC and Rothesay had equivalent Solvency Capital Requirement metrics, Rothesay did not have the same capital management policies or the backing of a large well-resourced group with a reputational imperative to support it over the lifetime of the annuity policies. Secondly, it had been reasonable, in the light of PAC's sales materials, age and reputation, for policyholders to have chosen PAC on the basis of an assumption that it would not seek to transfer their policies to a third party provider.

4. PAC and Rothesay appealed that decision.

5. About 1,000 policyholders objected to the Scheme, and some made submissions to the court. They submitted that the Solvency metrics employed by the Prudential Regulation Authority were entirely based upon analyses of the current year and made no attempt to predict what risks the future might hold. The individual policyholders explained how they had chosen PAC for its age and reputation. They made powerful submissions about how those features allowed them peace of mind.

6. The Prudential Regulation Authority and the Financial Conduct Authority assisted the court, but did not object to the Scheme. The Association of British Insurers intervened to express the concerns of the industry.

Essential background

7. PAC has been in existence since 1848 and has a reputation as a venerable and substantial business. The reputation of Prudential group was described on the website of Prudential plc as having provided "financial security since 1848".

8. Rothesay was established in 2007 by The Goldman Sachs Group, Inc to conduct business as a specialist provider of annuities. Rothesay is now owned by GIC Private Limited (the Singaporean sovereign wealth fund) and the Massachusetts Mutual Life Insurance Company.

9. The independent expert, Mr Nick Dumbreck FIA, produced a number of reports. His overall conclusions were that the Scheme would not have a material adverse effect on the security of benefits or reasonable expectations of policyholders with PAC or Rothesay.

10. Section 111(3) of FSMA provided that "[t]he court must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme".

11. The court said that there had been a plethora of first instance decisions approving insurance business transfer schemes under Part VII. It was important

to understand the nature of the business with which the court was concerned. Different interests were engaged when considering different types of business.

12. The judge at first instance had given 6 reasons for exercising his discretion to refuse to sanction the scheme: (i) annuitants could not change their provider, (ii) policyholders would reasonably have assumed that PAC would not transfer its obligations, (iii) despite the Solvency metrics, the court had to consider the respective capital management policies of the transferor and transferee, (iv) there was a disparity between the external support potentially available for PAC and Rothesay, (v) the age and reputation of Rothesay, and (vi) PAC was not prejudiced by the refusal to sanction the Scheme as it had already achieved its main business purpose.

13. The central issues raised by the appeal were:

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

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

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

14. In its judgment, the Court of Appeal (Sir Geoffrey Vos, Chancellor of the High Court, David Richards LJ and Sir Nicholas Patten) began by explaining at [75]-[86] the proper approach that the court should adopt in considering the sanction of schemes under Part VII.

15. On the first and second issues, the judge had been wrong to think that the independent expert and the Prudential Regulation Authority were not justified in looking at the solvency metrics at a specific date to support their opinion that there was only a remote chance of parental support being needed in the future. They were judging the metrics of the companies on the basis of an analysis of their likely resilience to a 1-in-200 year stress event within the coming year. The fact that Rothesay would continue to be regulated under the same rules from year to year into the foreseeable future meant that the present conclusion of the expert and the Prudential Regulation Authority were valid parameters for Rothesay's future security.

16. The judge had been wrong to find that there was a material disparity between the non-contractual external financial support potentially available for each of PAC and Rothesay. The likelihood of non-contractual parental support being available in the future was, anyway, not a relevant factor for the judge to take into account. Parents could never be required to support their subsidiaries'

capital whether for reputational reasons or on any other basis. Moreover, parents of insurers were always at liberty to sell their regulated subsidiaries to others with lesser resources.

17. The judge had not accorded adequate weight to the conclusions of the independent expert that the risk of PAC or Rothesay needing external support in the future was remote. The judge failed to accord adequate weight to the Regulators' lack of objection to the Scheme, and the continuing future regulation of Rothesay.

18. On the third issue, the Court of Appeal concluded that the judge ought not to have accorded any weight to the facts that the objecting policyholders (a) chose PAC on the basis of its age, venerability and established reputation, and (b) reasonably assumed that PAC would provide their annuity throughout its lengthy term. The question was whether the Scheme would have a material adverse effect on the policyholders. If the policyholders' prospects of being paid are essentially the same with and without the Scheme, it was hard to see how there could be any material adverse effect on the policyholders' security of benefits caused by the Scheme.

19. Accordingly, the appeal was allowed, and the renewed application for the sanction of the Scheme would be remitted to another judge sitting in the Insolvency and Companies List of the Business and Property Courts of England and Wales.