Neutral Citation Number: [2018] EWHC 3228 (Ch)

Case No: CR-2018-009677

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

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

Date: 21 November 2018

Before :

Mr Justice Norris

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Between :

IN THE MATTER OF CERTAIN OF THE MEMBERS AT LLOYD'S FOR ANY OR ALL OF THE 1993 TO 2018 (INCLUSIVE) YEARS OF ACCOUNT, REPRESENTED BY THE SOCIETY OF LLOYD'S

AND

IN THE MATTER OF LLOYD'S INSURANCE COMPANY SA

AND

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

Martin Moore QC and Mary Stokes (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimants**
Tom Weitzman QC and Julian Burling for the **Prudential Regulation Authority**
Charlotte Eborall for the **Financial Conduct Authority**

Hearing dates: 20-21 November 2018

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APPROVED JUDGMENT

Mr Justice Norris Wednesday, 21st November 2018
(14.04 pm)

Ruling by MR JUSTICE NORRIS

1. The Society of Lloyd's ("Lloyd's") is a statutory corporation established by the Lloyd's Act of 1871. The Society itself does not conduct insurance business but it admits members to the market, which members conduct insurance business (both life and non-life) on their own accounts.

2. The present proceedings do not concern life policies. Nor do the present proceedings concern non-life policies for 1992 and prior years of account. The non-life liabilities of members, former members and the estates of former members for those years of account were transferred on 30 June 2009 to Equitas Insurance. The present proceedings are, therefore, only concerned with non-life business, written in the years of account 1993 to 2018 inclusive. That is the relevant business. I use the word "only", but the relevant business consists of 25 years of policy writing with over £600 billion worth of gross premium written.

3. The lines of business are extensive. They cover accident and health, airlines, credit and political risk, directors' liability, employers' liability, engineering policies, extended warranties, general liability, hull and yacht insurance, medical malpractice, motor policies, weather and legal expenses and professional indemnity, to select some only from the long list set out in the evidence.

4. The relevant underwriting business is conducted by members (of whom there are some 20,000), syndicates of members (of whom there are some 415), using managing agents (of whom there are 116) and brokers (of whom there are 565) and members' agents and coverholders (of whom there are some 14,000). The nature of the business is such that not only are current members liable but also former members and the estates of former members in respect of losses occurring during the currency of policies which may now have ceased.

5. Some of that relevant business was and is conducted in the European Economic Area ("EEA"). It is estimated that some £62.6 billion worth of gross premium relates to EEA risks or to multi-jurisdictional policies with some EEA exposure. This £62.6 billion of gross premium constitutes approximately 10 per cent of the total Lloyd's market since 1993.
6. This insurance business could be conducted by Lloyd's members in the various EEA jurisdictions without the need to obtain separate authorisation in each jurisdiction under arrangements for the "passporting" of the authorisation granted by the Prudential Regulation Authority in the United Kingdom. The business was and is conducted using either branches opened in EEA territories, utilising EEA "freedom of establishment", or through the provision in the EEA of UK-based insurance services, using EEA "freedom of services".
7. When, under current arrangements, the United Kingdom leaves the EU, those "passporting" rights will end. Perhaps they will end in March 2019 or perhaps they will end at the end of a transitional period, maybe in 2020. Absent some new arrangement being made, in order to write new business, each member or syndicate of members, or their managing agents, will have to establish an insurance company in an EEA jurisdiction and use the "passporting" rights of that EEA company to conduct relevant business newly written through that company: and to service existing policyholders with relevant business in the EEA they would have to individually transfer current relevant business to that EEA company.
8. An authorised insurance company has been established by Lloyd's in Belgium called Lloyd's Insurance Company SA, colloquially referred to as "LIC". It is intended that it will establish branches in other EEA jurisdictions and a branch in the United Kingdom, that it will write all relevant business written in the EEA from 1 January 2019, and that it will reinsure that business with the Lloyd's members. Current relevant business in the EEA consists essentially of business with an EEA situs risk or where the policyholder is resident in the EEA. It is intended to

transfer all current relevant business with an EEA element for the years of account 1993 to 2018 inclusive to LIC, with reinsurance back to the Lloyd's market.

9. The necessity for each member to transfer current relevant business is intended to be overcome by this means.

10. The Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001 provides in Article 3 that the Part VII insurance transfer provisions, shall apply in relation to schemes "... for the transfer of the whole or any part of the business carried on by one or more underwriting members of the Society or by one or more persons who have ceased to be such a member" in the same way as they apply to insurance business transfer schemes.

11. Two conditions must be satisfied: the first is that the scheme results in the business transfer being carried on from an establishment of the transferee in an EEA state; and the second, that the Council of Lloyd's has, by resolution, authorised one person to act in connection with the transfer as transferor for the members concerned.

12. On 20 September 2018, the Council of Lloyd's passed an ordinary resolution authorising Lloyd's itself to act in connection with a Part VII transfer for all relevant members and former members of Lloyd's and the estates of former members of Lloyd's, who had underwritten or assumed liabilities with EEA situs risk or a policyholder resident in the EEA related to relevant business originally allocated to all or any of the 1993-2018 years of account.

13. The same day, Lloyd's made a direction to its members and former members (under its byelaws) providing that each member and former member of Lloyd's, and each estate of each former member of Lloyd's, who had underwritten or assumed liabilities with EEA situs risk or a policyholder resident in the EEA in relation to relevant business (a) must participate in the Part VII transfer and agree to transfer its relevant business to LIC, and (b) must appoint Lloyd's to act

on their behalf in relation to that Part VII transfer, so that Lloyd's could effect the transfer of the relevant policies to LIC on terms satisfactory to Lloyd's.

14. It is in that context that Lloyd's and LIC have issued the claim form that is now before me. The claim form seeks an order sanctioning an insurance business transfer scheme under Part VII of the Financial Services and Markets Act 2000 ("FSMA"). That is the relief which is sought in paragraph 1.

15. The claim form does not exhibit, nor does the evidence in support contain, the settled scheme itself but only a draft on which work is continuing (albeit that its general form emerges). An issue has arisen whether I can consider the claim form at all. That is because, by section 109 of FSMA, an application under section 107 in respect of an insurance business transfer scheme must be accompanied by a report on the terms of the scheme. As I have indicated, there is no settled scheme, as such, attached, so, accordingly, there cannot be any report of an independent expert in relation to that scheme: and no independent expert has yet been appointed.

16. Nonetheless, I am satisfied that this does not present a jurisdictional obstacle to my considering the claim form. In Re Speyford, [2008] EWHC 2960 (Ch) Floyd J. was faced with a similar problem. He was of the view that "the application" to which s.109 referred was the process of making the application not the single document by which that process was originated; and I agree with that approach. It does not matter that on the day that the claim form is issued the independent expert's report is not then available to be annexed. It must, of course, be produced and unless the application is accompanied by it that application cannot be progressed and considered. Nor do I consider that there is any procedural objection arising under CPR 8.5 and the Practice Direction 8APD7 by reason of the nature of the evidence that is attached to the claim form.

17. I shall therefore proceed to consider matters raised in the claim form beyond paragraph 1. What is sought in the present case is the making of an order giving some preliminary indications about

how the claim might progress. It is important that I set out the terms of the order which is sought, though I shall compress some of the provisions.

18. Paragraph 1 of the draft order seeks an order that on the evidence presented to date, the proposed scheme in draft form is "fit for consideration" by the court on the application by the Claimants, (a) for directions in respect of the notification of policyholders and other parties, and (b) for the sanction of the proposed scheme. The order is sought having regard to four matters: (a) having regard to the form of the transfer which is proposed; (b) having regard to the definition of the "transferring policies", which is proposed; (c) having regard to the "splitting" of policies which is proposed; and (d) having regard to proposed reinsurance arrangements.
19. Paragraph 2 seeks an order that the method proposed by the Claimants for establishing a transfer would achieve a substantial purpose "is appropriate". Paragraph 3 seeks an order that, subject to and without limitation to any further orders the court might make, the Claimants' proposed principles for the notification of policyholders are appropriate. The relief sought in paragraphs 2 and 3 is sought on the basis that it is provisional relief and subject to examination at later stages in the process.
20. The first question is: what jurisdiction do I have to make an order that the scheme is "fit for consideration" or that certain proposals are "appropriate" (but subject to reconsideration at a later stage in the procedure)?
21. Necessary participants in a Part VII transfer are the Prudential Regulation Authority ("PRA") and the Financial Conduct Authority ("FCA"). Each of them has been involved in the preparation of the proceedings in their present form, though the responsibility for the form of the proceedings lies plainly with Lloyd's and LIC. Lloyd's, LIC, the PRA and the FCA have reached an understanding recorded in a memorandum of understanding as to the legal effect of any order I might make.
22. The effect of the order as agreed is that, firstly, it will not in any way bind the court:

"As a result, the judge at any subsequent hearing will be entitled to reject the proposed scheme and/or any element of the scheme and will be able to do so on the basis of matters that were before the court at the time it made its order, i.e. the court will be entitled to make such order as it considers appropriate at a future hearing even in the absence of new material."

23. The memorandum of agreement secondly records:

"It will not in any way bind the PRA or the FCA (“the Regulators”). As a result, the Regulators will continue to be entitled to make representations in relation and/or object to the proposed scheme or any element of the scheme or any aspects of the transfer including the notification and communication proposals in respect of the scheme at or prior to any subsequent hearing, and will be able to do so on grounds which were available to them and of which they were or ought to have been aware at the time of the hearing of the application for the order, i.e. the PRA and the FCA will be entitled to raise any issues even in the absence of new material."

24. The memorandum also addresses the position of the independent expert in these terms:

"It will not in any way bind the independent expert appointed to report on the proposed scheme. As a result, the independent expert will be entitled and expected to reach his or her own view in relation to all matters falling within the ambit of his or her report, irrespective of whether such matters were before the court at the time it made its order."

25. As if that were not enough, the memorandum continues to say that for the avoidance of doubt the proposed application and the order I am now invited to make should not be understood as in any way binding the Regulators in respect of any aspect of the Part VII process itself. All matters will be dealt with as part of the Regulators' Part VII engagement with Lloyd's in the usual way and in accordance with the PRA statement of policy and the FCA's guidance.

26. The memorandum finally records the understanding that Lloyd's will develop the scheme based on the outline set out in the witness statement in support of the claim form and will keep the PRA and FCA informed as the scheme progresses.

27. Of course, an agreement in that form cannot confer jurisdiction upon me to make the order sought if I otherwise lack it. The PRA and the FCA are supportive of the making of this application. But because matters are at such an early stage, they are not supportive of any of the terms of the order which I am invited to make: neither Regulator has formed any view. That observation should not be taken as an indication that I have not been assisted by the submissions made on behalf of the PRA and on behalf of the FCA.

28. I have said that the agreement cannot confer jurisdiction upon me. It is established that the Court does not issue advisory opinions, nor does it consider, save in very rare circumstances, hypothetical questions. The Court can, of course, decide preliminary issues, but I am not asked to decide any preliminary issue. I am only asked to consider whether matters are "fit for consideration" or whether, on a provisional basis which is subject to a view throughout the process, certain steps are "appropriate".

29. The Court plainly has an inherent jurisdiction to express non-binding views. It frequently does so in the context of early neutral evaluation, a jurisdiction considered in Seals v Williams [2015] EWHC 1829, and which now finds its place in the revised terms of CPR 3.1(2)(m). The Court can also, in *inter partes* litigation, for the purposes of case management, express provisional views to assist in case preparation, without restricting the scope or nature of any final order : see CPR3.1(2)(m) again.

30. The question in the present case is the extent to which the Court should do so in what is not *inter partes* litigation but where the role of the court is ultimately to sanction a scheme. To what extent should the Court itself participate in the formulation of issues, in the production of evidence and in guiding the shape and form of the very scheme which it will ultimately be asked

to sanction (even if the judge at the sanction hearing is not the judge who has earlier participated)?

31. The Court has recently been faced with difficult, novel, vast and hugely expensive business transformation applications affecting many customers, clients or consumers. In that context, a clear lead was provided by the Chancellor and by Snowden J in some of the bank "ring fencing" litigation. The first case, brought on behalf of four clearing banks, is reported at [2017] EWHC 1482. The particular problem was that the banks could not make formal applications to sanction their ring fencing transfer schemes without the consent of the PRA. The PRA could not give their consent until they had considered a scheme report prepared by a skilled person. The skilled person would need to know what range of impacts he or she had to consider. The banks therefore had to issue claim forms in *intended* ring fencing transfer scheme applications to seek the Court's prospective guidance in relation to communications to persons potentially affected by the RFTS. Did they have to communicate only with those who were in their or the independent expert's view "likely" to be affected: or should they communicate with a wider class or with all customers?

32. Of these pre-RFTS application claim forms the Chancellor said, at paragraph [6]:

> "The procedural innovation provided by these claim forms is, in my view, well within the inherent jurisdiction of the court to regulate its own procedure."

33. He went on in paragraph [8] to express the rationale for that view. He said:

> "It goes without saying that the Court will give such assistance as it can in cases of this kind to ensure that the applications proceed expeditiously and efficiently and that all necessary parties are heard, and that the issue is resolved and concluded within the statutory timetable. It is nonetheless important for the parties and all those affected by the RFTSs with which we are concerned to understand that the directions which the court will give at this stage are given on the information currently available to the court. They are not to be regarded as set

in stone. They are necessarily subject to any further directions and orders that the court may make in the individual application for each bank. That is especially true because, although the hearing before us has been attended by counsel for the banks and for the regulators, the hearing has not been notified to consumers, customers or stakeholders or to others who may be affected, nor even to representatives of such groups. Such people, therefore, have had no opportunity to make representations concerning the process which is to be adopted".

34. The same willingness to give what the Chancellor called "prospective guidance" is evident in the decision of Zacaroli J in Re Barclays Bank plc and Barclays Bank Ireland Plc [2018] EWHC 2868. The problem which faced the bank in that case was that there was an interconnectedness between services provided by two different companies in the provision of a single client-facing service. In broad overall terms, there was one business operated out of two entities. What was proposed was that the business of providing the service should be transferred to Barclays Bank Ireland Limited. But one of the service-providing companies was not authorised to accept deposits and, therefore, apparently fell outside the scope of the businesses that could be transferred. The judge was asked to provide a preliminary ruling to the effect that the transfer of that business as an ancillary transfer under section 112 of FSMA to render effective the transfer of the business of the other company would suffice.

35. He took the view on a preliminary basis that it would suffice. The way he put it, in relation to one of the arguments advanced before him, was:

> "the only question for me at this stage is whether the transfer of a part of BCSL's business is incapable of being so described…"

i.e. described as incidental, consequential or supplementary to the scheme that was being sanctioned. He answered that question in the sense that it was capable of being so described. But he did not reach a final view about it.

36. The Chancellor's general statement of principle (and the caveat he attached to it) and the approach adopted by Zacaroli J. seem to me to point the way.

37. However, I consider that any invitation to give "prospective guidance" expressed as a "provisional view" must be approached with considerable caution. The Court itself does not have an interest in or investment in the outcome of any application: its task is to subject what is eventually submitted for sanction to entirely independent scrutiny. Any "provisional view" expressed exerts a subtle formative influence as the application proceeds. In the instant case I feel that, on the evidence as I have it, were I to express something which might be called a "provisional view" with the object of "de-risking" the application, my view might have (notwithstanding the agreement reached between Lloyd's, the FCA and the PRA) an undue influence on the way that matters proceed.

38. But what I am entirely comfortable with doing is expressing a view whether, on the material at present before the Court, the proposed courses of action are, even if agreed by the Regulators, obviously incapable of satisfying some criterion established by statute or authority. To put it in more picturesque terms, whether, even at this early stage in the journey, it is apparent that there is a roadblock.

39. Similar considerations arise in *inter partes* litigation, where applications are made to strike out a claim or to grant summary judgment on a claim where it has no real prospect of success. In that context, where the Court expresses a view about the reality of a case, it does not in any way express a provisional view about the outcome of the case. In confining myself to answering the question I have identified, I intend to adopt the same approach. Is the proposed action obviously incapable of satisfying some criterion established by statute or authority? A negative answer to that question does not provide a provisional view about the outcome of the application. (In posing the question in that way on this application I am not intending to exclude the possibility that a differently formulated question might be appropriate in other circumstances).

40. I shall now address each of the questions which is posed for my consideration.

41. On the evidence presented to date, is the application fit for consideration by the court at a directions and sanctions hearing, bearing in mind that the proposed scheme proceeds as a single combined transfer co-ordinated by Lloyd's on behalf of its members?

42. I am clear that the application is fit for consideration for directions and for sanction, notwithstanding the matter referred to. I think there is a real (as opposed to fanciful) prospect of an affirmative answer to the question whether Lloyd's can appoint itself as a transferor and whether it has properly done so.

43. The question could properly have formed the subject matter of a preliminary issue (with representative defendants perhaps appointed under CPR 19.7) so as to completely de-risk this aspect of the transaction. The relevant events have occurred and all one needs to work out is what are their legal consequences. But the fact that that course has not been taken does not mean that I should not answer the actual question posed by the application before me. There may be occasions on which the Court might insist on a preliminary issue being taken rather than a "fit for consideration" question being answered. But this is not one of them. The timescale is extremely short, the amount of work that needs to be done is massive, and the Court should give what assistance it can as soon as it can without insisting upon formality.

44. I think there is also a real prospect of an affirmative answer to the question whether the transfer of business relating to an EEA situs risk or an EEA resident policyholder will be carried on by LIC at an EEA "establishment" even if much of the servicing activity is in fact carried on from London. The situation is similar to that addressed in Re Prudential Assurance Company Limited [2013] EWHC 3877, in which the Court was able to develop a principled approach to the question of where business is actually carried on. I think there is much assistance to be found for the instant case in those principles.

45. The second question that I am asked to address is whether the scheme is fit for consideration by the court for directions and for sanctions having regard to the definition of "transferring policy" as set out in the proposed scheme. The great difficulty in the instant case is identifying in advance what policies are going to be transferred. Their sheer volume and their antiquity means that it is difficult to ascertain what risks are actually live. What is therefore proposed is a definition of "transferring policy" which enables the relevant policies to be identified (if necessary) when, as in reality will happen, a claim is made on the policy. I think there is a real prospect of the Court affirming the appropriateness of this course.

46. "Certainty of object" is a familiar question arising in relation to discretionary trusts and powers. The question posed is whether it can be said with certainty that any given postulant is or is not a member of the relevant class. The certainty relates to conceptual or semantic certainty, i.e. to the identification of the essential characteristics with sufficient precision to render the decision-making process workable. That is contrasted with evidential uncertainty, which makes it difficult or perhaps impossible to say in advance who are the entire class of relevant persons.

47. In the instant case, the key definitions are of "EEA policy" and of "Excluded Policy", and a key operative part are the words of transfer employed. Together they must ensure that EEA risks are transferred but that non-EEA risks are not transferred. I think there is some work to be done on those definitions and words of transfer, but I am satisfied that with appropriate revision it will be possible to create sufficient certainty of concept to enable the proposed scheme to be workable.

48. The third question which I am asked to consider is whether the scheme is fit for consideration, for directions and for sanction, having regard to the fact that it employs a "splitting" of policies.

49. It seems to me that the mere fact that the scheme involves a transfer of some risks under a policy to LIC, and the retention of other risks under the policy by members of the syndicate is not, of itself, obviously fatal. The court has jurisdiction under section 112(1)(d) of FSMA to make ancillary orders to ensure that schemes are fully and effectually carried out, and in Re AIG

Europe Limited [2018] EWHC 2818, Snowden J. used that jurisdiction to enable a split in policy risks. It all depends on how it is done and whether the concerns of the PRA and the FCA can be addressed. But there is no road block or obvious flaw on the material at present before the court. Although there is no requirement for the PRA and the FCA to give their approval, in practice if they are content with the proposed mechanism, then there is a real prospect of the Court approving a scheme employing that concept.

50. Part of the mechanism will be a reinsurance of risks. The risks transferred to LIC are to be fully reinsured back to the members, and members' outward reinsurance will, it is intended, be treated as retrocession cover. The arrangement is, again, as I understand it, to be given effect under section 112(1)(d) of FSMA. This is an approach similar to that which was adopted in Re Copenhagen Reinsurance Co (UK) Ltd [2016] EWHC 944, and I see nothing obviously wrong with it. But, of course, it will again depend on the detail of the mechanics.

51. The next question I am asked to address is whether the method proposed by the Claimants for establishing that a transfer order would achieve a substantial purpose is appropriate, though subject to the caveat that the answer to that question can be readdressed at any stage in the proceedings thereafter.

52. As was made clear in Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146, at paragraphs [19]-[20], a transfer order under Part VII will not be made unless it has some discernible purpose, i.e. even if, though it will not have effect throughout the world in respect of all policies transferred, it will nonetheless be effective not only in England, but also to a sufficient extent in other jurisdictions, for the order to achieve a substantial purpose. In the present case it is intended to establish that fact by evidence that a substantial number of the policies writing the relevant business are governed by the laws of England and Wales or by the laws of another EEA jurisdiction, probably where the policies were effected, and/or that the transfer will be regarded as effective in the United States. This was the course taken in Sompo

itself and there is nothing obviously wrong with it. It all depends on the evidence. Nor is there anything so obviously wrong with the proposed method of carrying out the jurisdictional analysis of the policies that (even if conducted as at present proposed) it would inevitably fail to produce evidence that the Court could be satisfied demonstrated a substantial purpose. I therefore see no road-block in the current proposals in that regard.

53. The last matter I am asked to consider is the question of notification to policyholders. This involves the identification of policyholders whose policies will be transferred and a consideration of the extent of the communication that has to be made with the holders of non-transferring policies.

54. I fear here that I can be of limited assistance for the applicants, because the communication programme is inevitably an iterative process to be carried out in consultation with the Regulators. Part VII, as adapted to the Lloyd's market by the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's Order) 2001, requires that notice is given by the applicants (as appointed to act for members whose business is being transferred) to every policyholder, subject to a dispensing power vested in the court.

55. This is not a simply formal requirement. The requirement to send a policyholder a notice stating that the application for a transfer has been made has an underlying purpose. The effect of the transfer changes the insurance obligations, and the point of a notice stating that the application has been made is so that each affected policyholder can participate, if they so choose, in the transfer process, either by making written representations or by attending at the sanction hearing.

56. Given that we are here talking of policies, written over a 25-year period and where some 90 per cent of the business written during that period does not involve *any* EEA risk or element, some dispensation is likely, bearing in mind the factors set out in Aviva International Insurance Ltd [2011] EWHC 1901. To take a simple example, does a resident of Bolton who has bought an extended warranty on a washing machine in 2014 need to know that the flood risk on an office

block in Bremen will hereafter be dealt with by transfer to Brussels. Would that generate unnecessary concern? The independent expert may have a view. The FCA may well have a view. But at the moment it does seem likely that some form of dispensation is going to be granted. There is a real prospect of the dispensing power being exercised. There is a real prospect that the dispensing power will be influenced by the practicality and utility of giving notice to such a large class, the proportionality of requiring the strict compliance with the provisions of the regulations and the availability of other means of communication to people who are concerned in relation to a proposed transfer. Those factors have to be addressed in the context of the records that are held for members (by managing agents, coverholders or brokers) , not simply by the records held by Lloyd's itself. But there is a real prospect of the Court being satisfied that communication should be directed to potentially active policies identified by reference to a "look-back" period, fixed by reference to the claims experience of individual lines of business. It therefore seems to me that the outline communication programme is (on the material at present available) not obviously inappropriate i.e. is such that even if approved by the Regulators as it stands the Court would say that it is so flawed that it cannot constitute fair communication. So there is no road block simply constituted by the proposed means of communication. But that view is, of course, is subject, as everybody recognises, to the developing views of the Regulators which will heavily influence (even if they cannot determine) the final outcome.

57. In short, I am prepared to make an order, the terms of which may vary slightly from the terms of the draft before me, recording that I do not at present see any feature of the proposed scheme which renders it obviously incapable of satisfying any criterion established by statute or by the authorities as needing to be fulfilled before sanction can be granted. I hope this is of assistance but if the form of order can provide more assistance to the applicants and does not meet with objection from the PRA or the FCA, I will certainly consider a further form of order.