Neutral Citation Number: [2019] 261 EWHC (Ch).

Case No: CR-2018-008017

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

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

Date: 05/02/2019

Before :

THE HON MR JUSTICE NORRIS

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IN THE MATTER of UBS LIMITED
And
IN THE MATTER of UBS EUROPE SE
And
IN THE MATTER of PART VII of THE FINANCIAL SERVICES AND MARKETS ACT 2000

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- -

Mr Martin Moore QC and Mr Stephen Horan (instructed by **Clifford Chance**) for the Applicants

Hearing date: 5 February 2019

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APPROVED JUDGMENT

MR JUSTICE NORRIS:

1. The transfer with which I am concerned is not driven by a desire to achieve some commercial advantage, or to bring about some internal rationalisation of UBS Ltd. It is a response to the external shock of Brexit.

2. UBS Ltd conducts investment banking business and some wealth and asset management business for customers and clients in the EEA. It serves as a hub for the UBS Group's access to EEA markets and the central clearing of counterparties. The EU principle of "freedom of services" means that it can carry out its business throughout the European Economic Area, and the principle of "freedom of establishment" means that it may do so through branches in the EEA. As matters now stand, the UK will withdraw from the EU on 29 March 2019 and, there being no withdrawal agreement in place, the ability of UBS Ltd to conduct that business under its "passporting rights" will immediately cease. There will be disruption to its business and to the business of its clients and customers. As UBS has explained to those clients and customers, it has embarked upon a planning strategy to ensure that it can continue to service existing investment bank customers and to continue to provide services in EU jurisdictions after Brexit.

3. It is necessary to introduce the parties. UBS Ltd ("UBS") is an English private limited company with branches in Germany, Italy, Sweden, Switzerland, Netherlands and Poland. It is a wholly owned subsidiary of UBS AG ("UBS AG") which is a Swiss company. UBS AG has a London branch. UBS

AG has also given a parent guarantee of any contract entered into by UBS with any counterparty.

4. Another wholly-owned subsidiary of UBS AG is a societas Europaea, called UBS Europe SE ("UBS SE"), registered in Germany and supervised by the German Federal Financial Authority.

5. What is proposed is that the investment bank, wealth and asset management business of UBS will be moved by transfer or merger either to UBS AG or to UBS SE. There are three mechanisms. First, there is a business arrangement between UBS and UBS AG to transfer various contracts to the latter, either with the consent of clients or counterparties or using transfer mechanisms in existing contractual provisions. Secondly, there is to be a transfer of some of the business of UBS to UBS SE (without client or counterparty consent and with any ancillary orders necessary to make that transfer effective), under section 106 of the Financial Services and Markets Act 2000. Thirdly, there will be left some residual assets of UBS (and certain contracts excluded from the two preceding transfer mechanisms) and they will be caught up in a cross-border merger by absorption between UBS and UBS SE under the German cross-border regulations. As to this last mechanism, the requisite pre-merger certificate has been obtained and all that needs to be done in order to make it effective is to register that in Frankfurt at the appropriate time.

6. There are a number of points to be made about this scheme.

7. First, the scheme and the cross-border merger are inter-conditional. The scheme will take effect a scintilla of time before the cross-border merger pre-registration certificate becomes effectively registered. There is a period

within which this registration must be done, and that, in effect, provides for a long-stop date on 24 July 2019. This long-stop date affords a measure of flexibility as to the implementation of the outstanding transfer scheme.

8. Second, I must approach this case on the law as it now stands. As I have said, by statute the UK will leave the EU on 29 March 2019. I cannot speculate what, if any, changes might be made or when they might be made to that present statutory position. That is made clear by the decision of Harman J in Re MB Group Plc [1989] BCLC 672 at 681a-g. UBS will be unable to serve the needs of part of its customer and client base and those customers and clients will be unable to continue to enjoy the benefit of current arrangements with UBS, on the law as it now stands.

9. Third, although I am concerned to focus on the scheme, that scheme has to be seen in the context of the wider arrangements to which I have referred, namely the consensual transfers to UBS AG and the residual transfers under the cross-border merger.

10. Fourth, I would note that in relation to the scheme all formal requirements have been met. I will not list how and when; but I will focus upon whether the court may sanction the scheme.

11. Fifth, in uncertain times it is important that the Court should adopt a consistent approach to applications to approve schemes of this sort. I therefore intend to follow the path beaten by others, in particular by Henderson J in Alliance & Leicester Plc [2010] EWHC 2858 (Ch) at paragraph 44ff, by David Richards J in ING Direct [2013] EWHC 1697 (Ch) at paragraphs 8 and 9, and more recently Snowden J in Barclays Bank Plc [2019] EWHC 129(Ch).

12. Without wishing to gloss or add to anything they have said, in summary this approach involves the following:

(a) to acknowledge that the discretion under section 111(3) of Financial Services and Markets Act 2000 ("FSMA") is an absolute discretion and, whilst according due recognition to the commercial judgment of the directors of UBS, to remember that the Court does not apply a rubber stamp but gives independent consideration to the scheme.

(b) to approach the sanction issue by enquiring who, if anyone, might be adversely affected by the scheme; but in assessing those adverse effects, to have clearly in mind what is the relevant comparator - adverse compared to what?

(c) to remember that some adverse effects might be mitigated or might be inevitable or inconsequential or a necessary price to pay to achieve some greater objective, so that adverse effects are not of themselves a bar to approval.

(d) to pay close attention to any views expressed by any regulator or which may be inferred from a regulator's conduct e.g. a decision not to exercise a statutory right to attend at a hearing.

(e) to focus on the scheme that is presented to the court and to enquire whether it is appropriate to sanction that scheme and not to ponder whether there might be some better scheme which could be implemented.

(f) in making all of those assessments, to place the scheme in its real context, taking account of other arrangements also being put in place.

13. Without wishing to disturb in the slightest this learning, I would add that in the instant case, where those affected are in general financially sophisticated market participants who have been able to engage fully with an extensive communications programme, I have felt able to factor into my own assessment the response of those who are affected by the proposals.

14. I need comment only briefly on the transfer of business from UBS to the London branch of UBS AG. Broadly speaking, the subject matter of this transfer is business which does not have to be moved to UBS SE because of Brexit and its associated loss of "passporting" rights. The relevant clients are therefore principally UK clients, but there are also some clients in Belgium, Germany, Ireland, Luxembourg and the Netherlands as well as non-EEA clients and counterparties. The transfer of this business can be achieved either under the terms of business upon which business with these clients is conducted (which do not involve their consenting to the transfer) or alternatively by means of consensual transfers leading to a novation of the contracts to UBS AG.

15. There are some exceptions from this broad description of what is to be transferred. That is because in relation to certain sorts of business it is operationally preferable to keep this business entire and to transfer it to UBS SE. This relates to some over-the-counter derivative business, to the business of EEA cash equity clients and to the deposit-taking business upon which the whole transfer really hinges. There is also a small amount of what is called "non-core and legacy business", principally portfolios that are in "run-off" and with no active management.

16. Customers and clients of UBS who do not agree to transfer to UBS AG will either have their contracts terminated, as would in effect be the case if there were a no-deal Brexit, or will be transferred under the scheme or under the cross-border merger, having been informed of the consequences of such moves and afforded the opportunity to exercise a choice in the matter.

17. In all, some 5,354 contracts with some 3,164 counterparties are involved in this transfer, representing about € 6bn of total assets.

18. As I have indicated, this consensual transfer has largely been completed. It means there is a residue of business in UBS and it is that which essentially forms the subject matter of the proposed transfer scheme under Part VII of FSMA.

19. Under the proposed Part VII scheme the transferring business will be transferred to UBS SE, which will then conduct it from its headquarters in Frankfurt or through its branch network in the Netherlands, Sweden, Italy, Luxembourg, Austria, Denmark, Poland, France and Spain and in new branches that are to be established in Switzerland and the UK. The use of a scheme has the following advantages.

20. First, it will effect a transfer of the relevant contracts by operation of law without the need for individual transfers. Second, the use of the scheme will mean, because of the terms of section 112A FSMA, that the transfer will not give rise to any right under any contract to terminate or make a claim in respect of the transfer. Third, because the scheme may incorporate ancillary provisions designed to give it full effect, the scheme itself can be used both to make all necessary amendments to the relevant contracts to give them

continuing effect,and also to transfer business other than pure banking business.

21. The transferring business has assets of over €32bn and an attributable revenue of €306 million. There are some 5,785 contracts (looking at matters at a high rather than a transactional level) involved, engaging some 2,483 clients and counterparties. A full description of the business is contained in the evidence. Without enumerating all of it, I will identify certain key elements.

33. First, the business of deposit-taking. This, as I have indicated, is the gateway through which the scheme may be launched. UBS takes term and overnight deposits as an integral part of its business activities. At present, the volume is relatively small, and forms part of its Group Asset and Liability Management business. On 17 January 2019, the cash balance summary of deposits held by UBS was about £155 million. There had been a rolling one-year average of about £163.8 million. In absolute terms, this is a sizeable sum, though in relative terms it is only a small proportion of UBS's business. It is, however, in my judgment a sufficient and real business which is the subject of transfer.

34. The second category of transferring business is UBS's equities business, both global cash equities (such as what the evidence calls “vanilla cash equities”) and equity derivatives offering structured synthetic and equity-linked products for investment, hedging and risk management purposes.

35. The third type of business is the foreign currency, rates and credit business. As its name suggests, this includes foreign exchange and money market services, trading and market-making in selected cash and derivative rates

products, and sales trading and market-making activities in credit products, such as corporate bonds, bank debt and credit derivatives.

36. A fourth category of business is what is called "corporate client solutions". Briefly, this is merger and acquisitions and corporate advisory work, accessing working capital markets and providing lending and financial solutions for corporate financial institutions and sponsor clients.

37. A fifth category of business is one to which I have already referred - the group asset and liability management activities of UBS. In essence, this is risk exposure management, enabling companies actively to address the risk arising in the course of their operations. Included in that business is what is called the cash and collateral resource management business, which provides, amongst other things, for a supply of cash and collateral to enable the optimisation of financial resource consumption.

38. Lastly, I will mention a small volume of wealth management business (an activity which already forms a significant part of UBS SE's business).

39. About 88 per cent of the contracts relating to the business I have described are governed by English law, the balance through a variety of EU and non-EU jurisdictions.

40. What I have summarised in the course of this judgment is set out in great detail in the evidence. But I consider my summary is a fair one. It will be apparent that the transferring business includes a lot more than the deposit-taking business. But, as I have observed, the deposit-taking business is a small but sufficient business to warrant the use of a scheme; and the

jurisdictional requirements to use a Part VII scheme are satisfied. Further, it has long been recognised that a scheme need not be confined simply to the transfer of, for example, the deposit-taking business, and that other business may be transferred alongside it.

41. Those concerned in the scheme have considered the impact of the transfer of this business to UBS SE. The scheme has been drawn so as to contain the provisions necessary to implement the scheme in an effective and commercially sensible way, such as to fall within the power to make ancillary orders alongside the sanction of the scheme itself.

42. I will mention six out of the multiple heads of consideration that have been undertaken in relation to the scheme.

48. First, the transfer of English law contracts to a German-registered UBS SE for administration out of its Frankfurt HQ will require an updating of customer and client contracts. The evidence sets out what those amendments need to be. Some of them are simple and straightforward, such as a replacement of the name of the contracting party. But others go beyond the mere substitution of names and, for example, including a process agent. Overall the effect is to preserve so far as possible the contractual relationship that is being transferred.

49. Secondly, as well as what might be called the updating of the contracts, there is a requirement to make the contracts compliant with German law. The evidence dwells on one particular change that needs to be made. Both the UK and Germany are subject to the Bank Recovery and Resolution Directive 2014/59/EU ("BRRD") which provides for the exercise of "bail-in" powers by

a resolution authority. The present form of contract with UBS does not make explicit reference to this, because any exercise of "bail-in" powers by the Bank of England as the UK resolution authority will be automatically effective. But on Brexit day the BRRD will cease to read compatible terms into English law-governed client and counterparty contracts. Accordingly, appropriate wording will need to be imported into those contracts which are being transferred and are governed by English or non-EU member state laws (or into contracts which are the subject of the jurisdiction of English courts or the courts of any country which is not an EU member state). Furthermore, the German implementation of the BRRD requires the contract to recognise the ability to impose a stay. This also must be introduced into the transferring contracts. The scheme has been so drawn to bring into effect these requirements.

50. As was clearly explained in the FAQ sheet and the scheme summary provided to all transferring contractors and counterparties:

> "If your contracts with us are governed by English law, Article 55 wording will need to be imported into them. UBS is requesting that the High Court grant an order to incorporate such wording into transferring Part VII contracts governed by English law to ensure that you do not need to take any further actions to effect this change."

After commenting on the need to introduce provisions relating to a contractual stay, the summary continues:

> "The above orders are not intended to materially change the contractual agreement between or the position of you and UBS."

I consider that a fair summary of the effect of the scheme.

51. Thirdly, I should draw attention to the recognition that the transfer of the contracts from England to Germany will incorporate a loss of the protections afforded by the Client Asset Sourcebook ("CASS") in relation to certain English contracts. CASS provides that certain client monies are held upon a statutory trust, and in the event of an insolvency are distributed in a particular fashion. After consideration, it has appeared to those who have drawn the scheme that an attempt to replicate the effect of an English statutory trust in German contract law would be disproportionately complex. Accordingly, it is the case that one of the effects of the transfer of the contracts will mean that some contracting parties lose the benefit of CASS protection.

52. Some clients will have consented to a transfer to UBS AG in order to preserve the protective effect of CASS. Others will have decided not to take that option and in effect to lose the protection. Yet others will not have had that option. Certain mitigating steps have been taken, but it remains the case that in some instances the CASS protection is involuntarily lost. But in reality the lost protection is more theoretical than real. That is because the credit rating of UBS SE is the same as that of UBS, that UBS SE is subject to the regulation by the German federal authority, BaFIN, and that its capitalisation is comfortably above the regulatory minimum. Thus the circumstances in which CASS protection might be relevant are remote indeed.

53. Fourth, the same is true of FSCS protection (available to some, though not many, of UBS's clients). Germany also has a Financial Services Compensation Scheme. It is in some respects less advantageous to clients than that provided in the United Kingdom. So, for example, whereas the United Kingdom might

protect 100 per cent of a claim up to £50,000, the German scheme might protect only 85 per cent of a claim up to 20,000 euros. But once again the likely need to call upon something like a compensation scheme is in the circumstances remote and the slightly lessened protection is a regrettable but inevitable consequence of trying to preserve the contractual relationships which are potentially disrupted by Brexit.

54. Fifth, that also is the case in relation to insolvency. The German insolvency regime does not provide for a "special administration" in relation to banks, such as the UK insolvency regime provides. But once again the circumstances in which insolvency may be thought to occur are remote and the disadvantage, such as it is, is simply an inevitable consequence of an endeavour to preserve the contractual relationships otherwise potentially disrupted at the end of March.

55. The last matter I should mention is that of the parental guarantee to which I referred at the outset of this judgment. Counterparties of UBS, as I indicate, benefit from a guarantee provided by UBS AG. This guarantee will continue to apply to payment obligations incurred by UBS before the time when the scheme becomes effective but will not apply in respect of contracts transferred for payment obligations incurred by SE after the effective date or to any new agreements entered into by SE. There is an exception to this in relation to contracts which contain "a single-agreement" clause, e.g. as part of a netting arrangement. The guarantee will continue to apply to these single-agreement clause contracts until such time as the parent guarantee is terminated or otherwise falls away.

56. Alongside the existing parent guarantee it is proposed that UBS AG will provide a new guarantee addressed to counterparties of SE in relation to master netting agreements which contain a single-agreement clause which are transferring contracts, or which are entered into after the date on which the scheme becomes effective, and which are entered into as part of the investment bank work of UBS SE. To this extent the inability to draw on the existing parent guarantee is substantially mitigated. In this way the proposed effect of the transfer has been diligently considered and, where possible, appropriate provisions included in the scheme to mitigate any adverse consequences.

57. So much for the scheme itself. The scheme, as I indicated, will only become effective immediately before the cross-border merger is effective. The cross-border merger involves the merger of UBS with UBS SE under the German Cross-Border Merger Regulations. The objective of this is to transfer by operation of law any of the residual assets of UBS which have not formed part of the consensual transfer to UBS AG or formed part of the scheme. It also provides a secondary route for the effective transfer of contracts in relation to any jurisdiction which chooses not to recognise a transfer under section 112 of FSMA as effective for the purposes of its local law.

58. In this way, all of the contracts of UBS will be transferred. UBS itself will be dissolved as part of the cross-border merger.

59. The scheme itself is relatively straightforward. In commending these arrangements to me, Mr Moore QC submitted that this is a scheme which was carefully designed, and one advanced for proper commercial reasons against

a backdrop of continuing and indeed intensifying Brexit uncertainty. He submitted, and I accept, that the parties have diligently assessed the impact and attempted to minimise or mitigate that impact. He submitted, and I agree, that the design of the scheme is one which strikes an appropriate balance between the desirability of certainty to clients and business on the one hand and to the exigencies of transferring to a different jurisdiction on the other.

60. I have already commented on the communications exercise which UBS has undertaken with its customers. It was comprehensive and readily comprehensible. The evidence shows that there has been engagement with it. I commented that I considered it a factor of some weight that no objections to the scheme have been maintained by any customer or client. Of the responses to the communication and to the website, only just over 200 related to the scheme. Most of them were simply requests for information and the one response which might be called "an objection" has been addressed and withdrawn. Neither the FCA nor the PRA (each of whom has been informed of the evolution of the scheme) has appeared today to put before the Court any concern.

61. In these circumstances, I consider it appropriate to sanction the scheme, including the ancillary provisions designed to bring the scheme into an effective and commercially sensible state. I will accordingly grant the order sought.