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THE HIGH COURT

2011 468 COS

IN THE MATTER OF THE ASSURANCE COMPANIES ACT 1909 THE INSURANCE ACT 1989 AND THE EUROPEAN COMMUNITIES (NON LIFE INSURANCE) FRAMEWORK REGULATIONS 1994 (EACH AS AMENDED)

AND IN THE MATTER OF A PROPOSED TRANSFER OF INSURANCE BUSINESS BETWEEN QUINN INSURANCE LIMITED (UNDER ADMINISTRATION) AND LIBERTY MUTUAL DIRECT INSURANCE COMPANY LIMITED

JUDGMENT of the President of the High Court Mr. Justice Nicholas Kearns delivered the 14th day of October 2011

This matter comes before the court by way of a petition brought under section 13 of the Assurance Companies Act, 1909 (as amended) (hereafter "the 1909 Act") and Article 35 of the European Communities (Life Assurance) Framework Regulations 1994 whereby sanction is sought for the transfer by Quinn Insurance Limited (under administration) (hereafter referred to as 'QIL') to Liberty Mutual Direct Insurance Company Limited (hereafter referred to as 'Liberty Direct') of certain business presently conducted by QIL under the authorisation issued by the Central Bank of Ireland as supervisory authority for the State for the purposes of the European Communities (Non-Life Insurance) Framework Regulations 1994 (S.I No 359 of 1994) as amended (hereafter referred to as "the 1994 Regulations"). This business comprises certain property, motor and casualty (excluding life and health) insurance business which relates to insured risks situated in the State and certain risks in the United Kingdom. Objections to the petition were lodged by the Law Society of England and Wales (hereafter referred to as "the LSEW"), by the Concerned Irish Businesses lobby group (hereafter referred to as "CIB") and by the Concerned Irish Citizens lobby group (hereafter referred to as "CIC").

QIL is a company incorporated in the State under the Companies Acts 1963 to 2009, with registered number 240768, and has its registered office at Dublin Road, Cavan. The constitution, objects and particulars of QIL are as follows:-

(a) QIL was incorporated in Ireland on 14th November, 1995 under the name Quinn General Insurances Limited, it changed its name to Quinndirect Insurance Limited with effect from 14th December, 1995; it again changed its name to its present name with effect from 2nd October, 2007.

(b) QIL's principal objects as specified in clause 2.A of its memorandum of association are:

"(i) Subject to holding the appropriate authorisation from the Irish Financial Services Regulatory Authority or other competent authority, to undertake and to carry out the business of insurance against non-life risks of all kinds and, in particular, risks in the classes set out in annex 1 to the European Communities (Non-Life Insurance) Framework Regulations, 1994 (as some may be amended, modified, replaced or re-enacted) from time to time;

(ii) Subject to the provisions of section 22(1)(a) of the Insurance Act, 1989, or any statutory modification, amendment or re-enactment of the same and any other applicable laws, rules and regulations, to reinsure any of the risks undertaken by the Company and to undertake, accept and to enter into contracts, agreements and treaties of non-life reinsurance (with full power to retrocede all and any reinsurance businesses of the Company).

(iii) To pay, satisfy or compromise any claims against the Company in respect of any policies or contracts granted by or dealt in or entered into or guaranteed or secured or reinsured by the Company which claims the company may deem it expedient to pay, satisfy or compromise."

(c) QIL is empowered *inter alia* by clause 2.B(xi) of its memorandum of association "to sell, improve, manage, develop, exchange, lease, mortgage, enfranchise, dispose of, turn to account or otherwise deal with all or any part of the property, undertaking, rights or assets of the company and for such consideration as the company might think fit."

(d) The authorised share capital is €25,000,000 divided into 20,000,000 Ordinary Shares of €1.25 each, of which 17,500,000 shares are in issue.

(e) QIL was authorised by the Central Bank of Ireland on 1st January, 1996 to carry on insurance business and is currently authorised to write insurance business in classes 1 to 18 inclusive, each such class defined by the 1994 Regulations.

Since its establishment, QIL has provided general insurance services including private and commercial motor insurance, motorcycle insurance and home insurance in Ireland. In more recent years, QIL has expanded its business to provide motor insurance cover in the United Kingdom. QIL has since discontinued certain lines of business in the United Kingdom and is continuing certain other insurance business in the United Kingdom which is not proposed to be included in the proposed transfer to Liberty Direct. QIL has established a significant market share in general insurance business in the State by development of sales channels direct to customers and to brokers by telephone from purpose-built call centres and by facilitating sales using QIL's internet site to allow customers to obtain immediate cover.

By orders of this Court made on 30th March, 2010 and 15th April, 2010, QIL was placed in administration in accordance with the Insurance (No. 2) Act 1983 and Paul McCann and Michael McAteer (together hereafter referred to as "the Joint Administrators" or "the Administrators") were appointed as Joint Administrators. The Joint Administrators have reported periodically to this Court on the progress of the administration of QIL in the administration proceedings. During this process the court has acquired a comprehensive understanding of the severe financial threat to the business arising from the financial problems of the Quinn group of companies of which QIL formed part and which had knock-on effects on the insurance company.

QIL is in administration because the circumstances mentioned in section 2(2) of the Insurance (No.2) Act 1983 arose in relation to it, including that it had become unable to comply with the requirements of the "supervisory regulations", including the 1994 Regulations. The manner in which QIL's business was being conducted had failed to make adequate provision for its debts, including contingent and prospective liabilities, so that a deficit had arisen in the value of its technical assets such as to potentially prejudice the rights and

interests of the holders of policies issued by it.

During the course of the administration of QIL, the Joint Administrators explored options for the disposal as a going concern of the general QIL insurance business. It was a particular concern of the Administrators in this context to preserve the jobs of employees of QIL and protect policyholders in any disposal. The Joint Administrators established a process under the direction and supervision of the High Court which was managed by Macquarie Capital (Europe) Limited (hereafter referred to as "Macquarie") for engagement with potential acquirers. This process culminated in the submission, consideration and assessment of bids by interested parties. On 14th April, 2011, the Joint Administrators announced that a joint venture involving the Liberty International group and the Anglo Irish Bank group was the preferred bidder for the QIL general insurance business, subject to approval from the relevant authorities.

On 28th April, 2011, the Joint Administrators entered into an agreement (hereafter referred to as "the Asset Purchase Agreement" or "the APA") for the sale and purchase of the QIL general insurance business as among themselves, QIL, Liberty Mutual Ireland Investment Holdings Limited (hereafter referred to as "Liberty HoldCo"), Liberty Direct, Anglo Irish Bank Corporation Limited (hereafter referred to as "Anglo") and Liberty International Holdings Inc (hereafter referred to as "Liberty International"). Liberty International is the principal operating company in the Liberty Mutual group of companies.

Liberty Direct is a wholly-owned subsidiary of Liberty HoldCo. Liberty Hold Co. is a joint venture owned as to 51% by Liberty ITB UK and Europe Holdings Limited (which is in turn wholly owned by Liberty International) and as to 49% by Tutelana Limited, a subsidiary of Anglo and in which QIL has an economic interest. Under the APA, Liberty International will provide the directors and senior managers who will be responsible for managing the operations of Liberty Direct. Pursuant to the APA the combined investment into Liberty Direct will facilitate Liberty Direct's application to obtain an insurance authorisation and is intended to ensure that Liberty Direct will be able to assume net liabilities under the Scheme. Both assets and liabilities are being assumed by Liberty Direct. While there is a deficit (the "target deficit") of liabilities in excess of assets transferred under the APA, assets will be transferred to Liberty Direct under the Scheme whereby the difference between the liabilities assumed and assets transferred will equal the target deficit.

Liberty Direct agreed under the APA to assume liabilities of €81 million in excess of the assets to be transferred to it by QIL. Since the execution of the APA, the Central Bank has indicated that it will be necessary to inject an additional €30 million in capital to Liberty Direct after the transfer. It has now been agreed between the parties that Liberty Direct will assume liabilities of €51 million in excess of the assets to be transferred to it by QIL. Therefore, if the Scheme is sanctioned, QIL will be obliged to transfer under the Scheme assets amounting in value to approximately €812 million, of which €766.7 million is expected to be cash.

Quinn Group Limited availed of certain loan facilities arranged by Barclays Capital in October 2005 and issued certain notes on various occasions between 2005 and 2007. It was a condition of the loan facilities and notes that guarantees would be given by certain subsidiaries within the Quinn group of companies, including a subsidiary of QIL involving total liabilities of approximately €1.3 billion. As part of the arrangements agreed between the parties, these guarantees will be released.

Liberty Direct is a company incorporated in the State under the Companies Acts 1963 to 2009. The constitution, objects and particulars of Liberty Direct are as follows:-

(a) It was incorporated in Ireland on 8th February 2011 under its present name

(b) Its principal object as specified in clause 2.1 of its memorandum of association is: "To undertake and carry out the business of insurance against non-life risks, in particular, risks in the classes described in Annex 1 to the European Communities (Non-Life Insurance) Framework Regulations 1994 (as amended, replaced or re-enacted from time to time)"

(c) It is empowered, inter alia, by clause 2.3 of its memorandum of association to "acquire and undertake the whole or any part of the business, property and liabilities of any person or company carrying on any business which the Company is authorised to carry on or which is capable of being conducted so as to benefit this Company directly or indirectly or which is possessed of property suitable for the purpose of this Company"

Both Liberty Direct and Liberty International are part of the Liberty Mutual Group ("LMG"), the ultimate parent company of which is Liberty Mutual Holding Company Inc. LMG is a diversified global insurer with headquarters in Boston. It is the fifth largest property and casualty insurer in the U.S. As of 31st December, 2010, LMG had $112.3 billion in consolidated assets, $95.4 billion in consolidated liabilities and $33.2 billion in annual consolidated revenue. It employs over 45,000 people in more than 900 offices around the world.

Liberty Direct applied in accordance with the 1994 Regulations to the Central Bank of Ireland on 26th May, 2011 for authorisation to carry on insurance business in the classes 1 to 18 inclusive as defined in the 1994 Regulations. On 29th July, 2011 Liberty Direct was granted authorisation in principle by the Central Bank of Ireland to transact business in classes 1 to 18 inclusive of non-life insurance business within the meaning of the 1994 Regulations. Actual authorisation from the Central Bank of Ireland is subject to certain conditions being satisfied and undertakings given as will be detailed hereafter.

The policies to be transferred pursuant to the proposed Scheme consist entirely of policies of insurance in the following classes, as defined by the 1994 Regulations: 1) Accident, 3) Land Vehicles, 6) Ships, 7) Goods in Transit, 8) Fire and Natural Forces, 9) Other Damage to Property, 10) Motor Vehicle Liability, 12) Liability for Ships, 13) General Liability, 14) Credit, 15) Suretyship, 16) Miscellaneous Financial Loss, 17) Legal Expenses and 18) Assistance. It is also intended to transfer under the Scheme, with certain exceptions, policies in these categories which, having lapsed, are reinstated before the time the Scheme becomes effective, policies in these categories incepted by QIL in accordance with the Asset Purchase Agreement up to the time the Scheme becomes effective, and arrangements which commit QIL to writing policies in these categories which provide cover during any period after the time the Scheme becomes effective. The policies proposed to be transferred relate to policy holders in Ireland and cover risks situate in Ireland and certain risks insured by such policyholders in the United Kingdom. QIL has also established reinsurance arrangements in respect of certain of the risks covered by the policies proposed to be transferred. It has applied for membership of the Motor Insurers Bureau of Ireland (M.I.B.I.) and has been accepted for such membership.

Part of the Administrators' application, and a pre-condition for the effective implementation of the Scheme, is the requirement to seek and obtain approval from the Court for the drawdown from the Insurance Compensation Fund of the sum of €735 million to enable Liberty Direct to maintain the required technical assets and solvency margins in respect of the continuing business and to meet obligations under the APA to inject sufficient assets into Liberty Direct to meet the target deficit.

That application was made to the Court on 4th October, 2011 when the Court was informed by Counsel on behalf of the Minister for Finance that he was assenting to such a drawdown. The Court was informed in this context that the Minister and his officials in the Department of Finance had been fully briefed on this transaction (i.e., the proposed transfer) and were fully familiar with all aspects

of it and supported both the application for the drawdown from the ICF and the proposed transfer. The bleak alternative of a liquidation of the company with a consequential call of €1.3 billion on the ICF permitted the Court to make the order sought on the 4th October as sought. While approval was given for the sum sought, the initial drawdown is for the sum of €320 million only and further applications for actual drawdowns from the sum approved in principle will be the subject matter of further applications to the Court as and when required.

Statutory Framework

Section 13 of the 1909 Act provides:-

> "(1) Where it is intended to amalgamate two or more assurance companies, or to transfer the assurance business of any class from one assurance company to another company, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement.
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> (2) The Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may sanction the arrangement if it is satisfied that no sufficient objection to the arrangement has been established.
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> (3) Before any such application is made to the Court-
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> (a) notice of the intention to make the application shall be published in the Gazette; and
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> (b) a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which the amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which the agreement or deed is founded, including a report by an independent actuary, shall, unless the Court otherwise directs, be transmitted to each policy holder of each company in manner provided by section one hundred and thirty-six of the Companies Clauses Consolidation Act, 1845, for the transmission to shareholders of notices not requiring to be served personally: Provided that it shall not be necessary to transmit such statement and other documents to policy holders other than life, endowment, sinking fund, or bond investment policy holders, nor in the case of a transfer to such policy holders if the business transferred is not life assurance business or bond investment business; and
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> (c) the agreement or deed under which the amalgamation or transfer is effected shall be open for the inspection of the policy holders and shareholders at the offices of the companies for a period of fifteen days after the publication of the notice in the Gazette.
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> (4) No assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the Court in accordance with this section."

The Insurance Act, 1964 provides for the establishment of the ICF, and section 3 of that Act provides:-

> "(1) Subject to the provisions of this section, there may be paid out of the Fund to the liquidator of an insolvent insurer proceedings for the winding up of which by the High Court were commenced or are commenced on or after the 1st day of January, 1963, such amounts as may be necessary to pay any sum (other than a sum payable in respect of the refund of a premium) which is due to a person under a policy issued by the insurer in the State and is in respect of a contingency the insurance of which is required by the Act of 1936 to be effected by an insurer, together with the costs or expenses (if any) necessarily and reasonably incurred by the person in endeavouring to secure payment of the sum, and, upon receipt of the amounts by the liquidator, he shall pay to every such person the sum due to him as aforesaid together with the costs and expenses aforesaid (if any) incurred by him.
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> (2) Where an amount is paid out of the Fund to the liquidator of an insurer under subsection (1) of this section in respect of a sum due under a policy issued by the insurer and the costs and expenses aforesaid (if any) incurred in relation to the sum, the amount paid shall be admitted in the proceedings for the winding up of the insurer by the High Court as a proved debt of the insurer having the same priority as the sum due under the policy and the Accountant shall, as respects the amount paid out of the Fund, be a creditor of the insurer.
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> (3) Where a sum is due to a person under a policy by reason of a judgment obtained against the person or in respect of compensation payable by way of a weekly payment by the person under the Workmen's Compensation Acts, 1934 to 1955, the amount payable out of the Fund under subsection (1) of this section in respect of such sum shall, subject to the provisions of this section, be such amount as the Judge of the High Court having seisin of the proceedings for the winding up of the insurer by which the policy was issued may consider reasonable.
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> (4) Where, in respect of a sum due under a policy, a payment equal to the whole of the sum is made by the Motor Insurers' Bureau of Ireland, a payment shall not be made out of the Fund under this section in respect of the sum, and where, in respect of such a sum, a payment equal to part of the sum is made by the said Bureau, a payment out of the Fund in respect of the sum shall not exceed the amount of the sum less the amount of the payment by the said Bureau
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> (5) Where sums in excess of one million pounds are due under policies issued by one insurer, not more than one million pounds shall be paid out of the Fund in respect of such sums and the payments shall be so made that in respect of each sum due under the policies the same proportion thereof is paid out of the Fund."

Section 36 of the Insurance Act, 1989 provides:-

> "(1) Whenever the Court sanctions under section 13 of the Assurance Companies Act, 1909, the amalgamation of two or more insurance companies or the transfer of insurance business of any class from one insurance company to another or an amalgamation or transfer as aforesaid is to be effected which does not require the sanction of the Court under that section, the Court shall, having had regard to all the liabilities of the companies, by the order granting the sanction, or where sanction under the said section is not required, upon application being made to it, provide for such of the following matters as the circumstances require:

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

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the amalgamation or transfer are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) such incidental, consequential and supplementary matters as are necessary to secure that the amalgamation or transfer shall be fully and effectively carried out.

(2) Where any order made under subsection (1) provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any mortgage or charge which is by virtue of the amalgamation or transfer to cease to have effect."

Part II of the 1994 Regulations relates inter alia to assignment of policies, and provides as follows at article 12:-

"(1) For the purposes of Section 13 of the Assurance Companies Act, 1909, and subject to the provisions of section 36 of the Insurance Act, 1989 , and of these Regulations, the following provisions shall have effect:

(a) An insurance undertaking transacting business in the State, proposing to assign all or part of its portfolio of insurance contracts concluded under the right of establishment or freedom to provide services in the State to an insurance undertaking established in the territory of a Member State, may apply to the Court, by petition, for an Order sanctioning the scheme of assignment.

(b) An insurance undertaking whose head office is situated in the State may, after prior consultation with the Minister, assign all or part of its portfolio of insurance policies including insurance business carried on either by way of services or establishment, to an insurance undertaking established in the State or in another Member State. The assignment shall not be effected unless the supervisory authorities of that insurance undertaking or, where appropriate, the supervisory authorities of the Member State referred to in Article 26 of the First Directive, certify that the insurance undertaking possesses the necessary solvency margin after taking the assignment into account.

(c) Where a branch, established in another Member State, whose head office is situated in the State proposes to assign all or part of its portfolio of insurance policies covering insurance business carried on either by way of services or establishment, the Minister shall consult the supervisory authority of the Member State of the branch.

(d) An insurance undertaking whose head office is situated in the State may not assign all or part of its portfolio of insurance policies to an undertaking, established in another Member State, whose head office is not situated in the territory of a Member State.

(2) (a) In the cases referred to in paragraphs (b) and (c) of sub-article (1) of this Article, the assignment shall not be effected without obtaining the agreement of the supervisory authorities of the Member States of the branch and the supervisory authorities of the Member States in which the risks are situated.

(b) Where the supervisory authorities have not given a response indicating consent to or an opinion on the proposed assignment within three months of receiving notification of the assignment, the assignment shall be deemed to be agreed.

(3) Where the Minister is consulted in accordance with Article 12 (3) or (4) of the Directive, the Minister shall have a period of three months from the date of consultation by the supervisory authorities of the home Member State within which to issue a response to those authorities.

(4) Where the Minister has not given a response indicating consent to or an opinion on the proposed assignment at the expiry of the period referred to in sub-article (3) of this Article, the assignment shall be deemed to be agreed.

(5) An assignment effected in accordance with this Article shall be published subject to the provisions of sub-article (1) of this Article by advertisement once in Iris Oifigiúil and once in each of two daily newspapers published in the State and published in the Member State where the risk is situated in accordance with the law of that Member State.

(6) An assignment effected in accordance with this Article shall be valid against the policyholders, the insured persons and any other person having rights and obligations arising out of the policies assigned."

In relation to the protection of employees where a transfer of an undertaking arises, Regulation 4 of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 provides:-

"(1) The transferor's rights and obligations arising from a contract of employment existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

(2) Following a transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement."

The Regulations are specifically applied to this proposed transfer by the APA itself and the Regulations further provide for the

preservation of pension benefits for transferring employees.

The Court will now set out a brief review of the relevant case law which provides some further guidance on how the relevant statutory framework should be interpreted and applied to an application of this nature. In *Re London Life Assurance Ltd* (21st February, 1989, Unreported), Hoffmann J (as he then was) held that, when considering whether to sanction a scheme for the transfer of long-term insurance business, account should be had to the fact that the board of the transferors must have concluded that the scheme is in the best interests of the transferors. He added that it is necessary to inquire as to whether any policyholders, employees or other persons would be affected by the scheme. However, the court has an unfettered discretion in this regard and even if there are adverse effects on some or all of these groups, it does not necessarily follow that the scheme will be rejected. Hoffmann J held:-

> "The need for Court approval to a transfer of life assurance business dates back to the Life Assurance Companies Act, 1870. Until then, life assurance business in this country had been virtually unregulated. One company could transfer its entire business without the knowledge or consent of its policyholders provided only that it had the necessary powers under its Deed of Settlement or Articles of Association and the small print of the policy made it subject to such powers. The Act of 1870 was passed in the aftermath of the spectacular failure in 1869 of the Albert Life Assurance Company, which had been highly acquisitive and taken over the business of more than twenty other societies. The main purpose of the Act of 1870 was to give regulatory powers to the Board of trade, but section 14 provided that no life insurance company should amalgamate with another or transfer was confirmed by the court. Before such an application could be made, a statement of the nature of the arrangements and copies of the actuarial reports on which it was founded had to be sent to all policyholders. The Court was given power, after hearing the Directors and 'other persons whom it considers entitled to be heard' to confirm the arrangement if it was satisfied that 'no sufficient objection to the arrangement' had been established. The power was however subject to a proviso that the arrangement should not be confirmed if it appeared that more than a tenth by value of the policy holders of the transferor company objected.
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> The Assurance Companies Act 1909 added the requirement that the material to be made available to the policyholders and the Court should include the report of an independent actuary, but in all other respects the provisions of the 1870 Act remain substantially unchanged until the Insurance Companies Act 1973 were replaced then with what are now sections 49 and 50 of the Insurance Companies Act, 1982. For present purposes, the following changes are relevant.
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> First, the veto exercisable by one-tenth or more of the transferor's policyholders disappeared. Secondly, the persons entitled to be heard on the petition (in addition to the applicant) were specified as the Secretary of State and –
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> > 'any person (including any employee of the transferor company or the transferee company) who alleges that he would be adversely effected by the carrying out of the Scheme.'
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> Thirdly, the power of the Court to sanction is no longer expressly conditional on it being satisfied that 'no sufficient objection' has been established. It is expressed as a completely unfettered discretion. I doubt whether this change of language makes any difference except to make it clear that even in the absence of objection the court is not obliged to sanction a scheme.
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> Although the statutory discretion is unfettered, it must be exercised according to principles which give due recognition to the commercial judgment entrusted by the company's constitution to its board. The court in my judgment is concerned in the first place with whether a policyholder, employee or other person would be 'adversely affected' by the scheme in the sense that it appears likely to leave him worse off than if there had been no scheme. It does not however follow that any scheme which leaves someone adversely affected must be rejected. For example, as we shall see, one scheme which might have [been] adopted in this case would have adversely affected many of London Life's employees because they would have been made redundant. But such a scheme might nevertheless have been confirmed by the court. In the end the question is whether the scheme as a whole is fair as between the interests of the different classes of person affected. But the court does not have to be satisfied that no better scheme could have been devised. A board might have a choice of several possible schemes, none of which, taken as a whole, could be regarded as unfair. Some policyholders might prefer one such scheme and some might think they would be better off with another. But the choice is in my judgment a matter for the board. Of course one might imagine an extreme case in which the choice made by the board was so irrational that a court could only conclude that it had been actuated by some improper motive and [that the board] had therefore abused its fiduciary powers. (Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821, 835). In such a case a member would be entitled to restrain the board from proceeding. But that would be an exercise of the court's ordinary jurisdiction to restrain breaches of fiduciary duty; not an exercise of the statutory jurisdiction under section 49 of the Insurance Companies Act 1982."

The Court has some prior experience of dealing with an application under the 1909 Act. In proceedings entitled *In the Matter of a Proposed Transfer of Assurance Business Between Irish Life plc and Royal Liver Assurance Limited* [2002] 2 I.R. 9, a petition was brought before the court seeking sanction pursuant to s. 13 of the 1909 Act, as amended, for the transfer of the industrial assurance business of the first petitioner to the second petitioner. Various objections to the proposal transfer were made by policyholders and shareholders of the petitioners, as well as objections raised by employees of the first petitioner. The Court held, in sanctioning the proposed transfer, that the relevant considerations which should apply whenever such an application was made, were as set out in *Re London Life Association Limited*. The Court further held that employees were adequately protected by the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations, 1980 and that the Court, if otherwise satisfied to approve a scheme, should only withhold its approval if there has been a substantial or egregious breach of those Regulations, or if satisfied that the disruption to the employees of an undertaking was so severe in its implications as to cast doubt on the conclusions of an independent actuary. In this context the Court held:-

> "[I]t is only appropriate to say that the extent to which employee concerns can affect the exercise of the Court's discretion in an application of this nature is necessarily limited. The statutory framework for the transfer of assurance business requires only consultation with policyholders, although on the hearing of the petition, the Court may hear the Directors and 'other persons whom it considers entitled to be heard'. The protection afforded to employees under the European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations, 1980 provides for a separate regime for informing representatives of employees affected by a transfer of the matters set out in Article 7 of the Regulations. To that extent, the Court must obviously have regard to the Regulations because a substantial or egregious breach of the obligations therein would inevitably influence the Court in the exercise of its discretion. The essential requirements are for the giving of information to unions and staff about the reasons for the transfer, the implications of same for employees and the measures envisaged in relation to employees in good time before the transfer

is carried out. It is not a requirement of the Regulations that negotiations on the working conditions of each and every employee who is affected by the transfer take place and be resolved to that employee's satisfaction before the obligation under the Regulations is discharged."

I am satisfied that the various statutory requirements for giving notice of the making of this application have been complied with. I further note that the transaction has received approval from the EC Commission and that EU Merger Clearance and EU State Aid clearance has been granted.

However, completion of the Scheme is conditional upon the following conditions being fulfilled to the satisfaction of QIL, Anglo and Liberty Direct:-

1) the European Commission having declared, without conditions imposed on Liberty Direct or any of Liberty's affiliates, that the transfer is compatible with the common market pursuant to Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings;

2) the final sanction of the Scheme by this Honourable Court;

3) the following with respect to Liberty Direct:

(a) the authorisation by the Central Bank of Liberty Direct as an insurance undertaking under the 1994 Regulations; and

(b) certification by the Central Bank that Liberty Direct will possess the necessary solvency margin after the transfer to Liberty Direct of QIL's insurance business;

4) QIL maintaining all authorisations, registrations, licences and/or consents necessary, whether in Ireland or the UK, in order to continue to market and underwrite insurance policies in the UK;

5) Liberty Direct obtaining and/or holding all authorisations, registrations, approvals, licences and/or consents necessary (whether in Ireland or the UK, to perform its obligations under the Transitional Services Agreement;

6) either:

(a) QIL and Liberty Direct having been provided with a copy of a decision confirming that the transfer does not involve State aid or to the extent that the transfer involves State aid, that such aid is compatible with the internal market; or

(b) QIL and Liberty Direct having been provided with a copy of written confirmation from the Department of Finance that it considers that there is no necessity for the transfer to be notified to the European Commission.

7) Quinn Property Holdings Limited and each of it subsidiaries having been released from certain guarantees given by it;

8) the relevant third parties having consented to the execution and performance of the Trade Mark Assignment and the Trade Mark Licences;

9) the relevant third parties having consented to the transfer of the Key IT Licences;

10) QIL securing the consent of reinsurance third parties to Liberty Direct being endorsed as an additional insured under the reinsurance agreement

11) Liberty Direct's application to become a member of the Motor Insurers Bureau of Ireland having been accepted;

12) there being no legal proceedings pending, or any Court order in existence, which seeks to or does, adversely affect, impair or prevent the sale of the Business and Assets to Liberty Direct;

13) there shall not have occurred any "material adverse change", as defined in the APA

14) the sanction of the High Court of an application by the Joint Administrators for a payment from the Insurance Compensation Fund in accordance with the Insurance Act, 1964; and

15) Liberty Direct having received a Projected Completion Statement from QIL which is prepared in accordance with Schedule 2 of the APA.

For the reasons hereinafter stated I am satisfied and feel I should immediately state that these various conditions have either been already met or will be met at the point when the agreement between the parties provides that the transaction be fully effective. In this regard I note, *en passant*, the important proviso contained in the arrangements which permits the parties to 'walk away' from this entire transaction if all matters are not concluded, including any court proceedings, by 15th December, 2011.

Counsel on behalf of the Administrators in making the application outlined various considerations both in relation to the Scheme, the protection it offered to both policy holders and employees, and the position in relation to the various conditions attaching thereto.

Counsel for the Administrators drew the Court's attention to the third condition in the Appendix to the Scheme, namely that Liberty Direct required the authorisation of the Central Bank as an insurance undertaking under the 1994 Regulations and that Liberty Direct required certification by the Central Bank that Liberty Direct will possess the necessary solvency margin after the transfer. Counsel stated that the Court was not being asked to sanction a Scheme which would result in an unauthorised insurer taking possession of the business and that the position of the policyholders and that of the employees will be appropriately protected. Counsel therefore

submitted that the Court was not being asked to do anything that would have an adverse impact on the policyholders or employees.

I turn now to the objections raised in the instant case. Multiple objections to the Petition were lodged by the LSEW, by CIB and by CIC.

The LSEW is the representational and regulatory body for solicitors who are admitted to the roll of solicitors in England and Wales and represents over 150,000 solicitors. It is a body incorporated by Royal Charter. Its regulatory powers and functions are conferred on it by statute, the principal regulatory statute being the Solicitors Act 1974. The LSEW is also an approved regulator under the Legal Services Act 2007.

The Solicitors Regulatory Authority (hereafter referred to as "the SRA") is the independent regulatory body of the LSEW. Under both the SRA Code of Conduct and the UK Indemnity Insurance Rules, all solicitors are required to have and maintain adequate professional indemnity insurance for the business of their practice. This obligation extends to insurance for the statutory limitation periods for actions taken after cessation of practice through death, retirement or otherwise. Such insurance is referred to as run-off insurance and is designed to protect retiring solicitors, their estates and former clients, in the event that a claim for professional negligence is made within the relevant statutory periods. Prior to entering administration, QIL wrote professional indemnity insurance policies for a number of solicitors in England and Wales. Although no new policies have been written since the appointment of the Joint Administrators, a number of solicitors who have ceased practice maintain run-off insurance with QIL. The SRA estimates that some 522 members of the LSEW have such run-off insurance policies with QIL. During the course of the hearing of the petition, Counsel on behalf of this interest withdrew any objection to the approval of the Scheme by the Court.

CIB is a group of small to medium sized businesses predominantly based in the Cavan, Leitrim and Fermanagh area. The individual members of the group have had direct or indirect dealings with QIL or the Quinn Group, either as policyholders or through business dealings. CIB also includes approximately 45 members drawn from the quarry and concrete product industries in Ireland. There are approximately 550 business members in CIB, the majority - in or around 70% - being policyholders of QIL and the remaining members are taxpayers. Much of their concerns derive from the huge negative impact the collapse of the Quinn Group has had on local life and employment in Cavan and surrounding counties and the burden the Scheme will impose on taxpayers generally. More specifically, it is common case that a 2% levy will be imposed on all non-life policyholders in the State by the Minister as part of the support for the Scheme of transfer. Thus, while counsel was at pains to stress that his clients' intentions were not to "derail" the transfer, he stated that his clients nonetheless had valid and genuine concerns and felt that some other more favourable deal might still be possible with some other purchaser. However, no such alternative purchaser was at any stage identified by this group.

The CIC represents a number of people from the Leitrim, Fermanagh and Cavan area. This ad hoc group was formed by local people in February and March 2011 in response to the collapse of the wider Quinn group. The group includes taxpayers and one employee of QIL. Its spokesperson was a policyholder but cancelled his policy as a form of protest at the events which had occurred. While this group arguably lacked *locus standi* to raise objections in relation to the welfare of policyholders, I nonetheless decided to hear submissions made on their behalf both in relation to employees and policyholders. Counsel for this group argued that the Court should be mindful of the welfare of employees, both those transferring to the new entity (the "goers") and those employees and policyholders remaining with QIL (the "stayers"). While material and information had been gathered from some seven or eight members of the group, including expressions of fear for their future and fears for themselves if they were seen to speak out against the Scheme, the objections, as in the case of CIB members, were largely directed to a request that the Court should itself undertake inquiries into the long term commercial benefits of the transfer and to inquire further into perceived shortcomings in the Scheme. In particular this group was concerned that under the terms of the Scheme, the interests of those policyholders who remained with QIL (i.e. the stayers), were not adequately protected because all or most of the assets of QIL were now going to be applied to discharge the guarantees, so that only a "husk" of a company would remain.

Mr. Baxter of A&L Goodbody solicitors, appeared on behalf of the Quinn Group in relation to any assertion that there were proposals potentially or actually available from the Quinn Group to rescue QIL. He stated that the Quinn Group had asked him to make clear to the Court that the Quinn Group fully supported the application being made to the Court.

During the course of the first hearing day of this matter I invited all parties before me to try and summarise the main points of objection and on the second day I ruled on an edited and truncated list of objections to which the parties had reduced matters overnight. In this context I took the view that I should not entertain objections based on general concerns arising from the cost to the taxpayer of the transaction. In my view the 1909 Act does not either permit or envisage such an approach by the Court. I accept as correct the submission made by counsel for the petitioner that for the court to do so would involve the Court in considering the fairness of the manner in which certain organs of the State, and notably the Minister for Finance, had administered public resources in this instance. In *O'Reilly & Ors v Limerick Corporation* [1989] I.L.R.M. 181, Costello J stated:-

> "In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to Dáil Éireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation. Approval for plans for expenditure and the raising of taxes is given in the first instance by Dáil Éireann and later by the Oireachtas by the enactment of the annual Appropriation Act and the annual Finance Act. This means that questions relating to raising common funds by taxation and the mode of distribution of common funds are determined by the Oireachtas…."

I do not see the Court therefore as performing a watchdog role on behalf of taxpayers in the context of what the Court is asked to do under the Act, although I fully appreciate that very real concerns arise in the public mind in this regard.

Equally in my view it is not for the Court to assess whether or not this is the best commercial deal which could have been secured for the disposal of the business of QIL as a going concern. The Court is neither empowered under the 1909 Act to do so nor has it the expertise or resources to engage in any such form of inquiry. It would inevitably involve an exercise in second-guessing business entities, the Administrators, experts and departmental officials who have explored every aspect of this proposed transfer. The Court must be mindful of its confined remit under the 1909 Act, which is primarily focused on the welfare of policyholders. It is not the function of the Court to inquire into every commercial consideration which motivated the contracting parties. It can not engage in a speculative process to determine if some more advantageous deal might have been arrived at. Had the objectors pointed up some financial abyss into which the policyholders were about to fall as a direct consequence of the transfer, that would of course be something the Court would have to consider, but no such evidence has been forthcoming, nor has any evidence been put in the balance by or on behalf of the objectors to challenge any of the assumptions or conclusions arrived at both by the Administrators and by the independent actuarial expert. I am therefore limiting my consideration of the commercial factors to those which may be fairly said to have demonstrable effects on both policyholders and employees of QIL.

There were other categories of objection which I also ruled to be extraneous to this application. First, there was the issue of the 'evolving and changing picture vis-à-vis the ICF'. This related to the fact that the Court was told that at the time of the appointment of the Administrators that they did not expect a call to be made on the ICF "at that time". However, it was never suggested that there would never be a call made on the ICF. A further objection to 'the fitness of Liberty Mutual' was unsupported by admissible evidence. An issue denominated as 'future option to purchase' was not pursued and other issues as to the amount of profits which might revert to the ICF and other issues of a plainly commercial character were also ruled out for the reasons outlined above.

The surviving objections can thus now be summarised as follows:-

1) Whether there exists a statutory obligation to provide the APA;

2) The impact on policy holders;

3) The guarantees which it is proposed to release

4) Whether the reserves were excessive;

5) The position of the employees.

I will deal with each category of objection in turn.

First, in relation to the objections in relation to the APA, CIB state that in its absence (it being common case that the APA was not given to the objectors) no sufficiently detailed information as to how the transfer is to take place had been made available to the public, policyholders or employees. By letter dated 20th September, 2011, CIB wrote to the Joint Administrators requesting certain information and documentation including the APA. A letter was also sent by CIB to the solicitors for the Joint Administrators dated 20th September, 2011, in which concerns were also raised. The solicitors for the Joint Administrators responded by letter dated 21st September, 2011, in which they provided certain information but refused to give a copy of the Asset Purchase Agreement. CIB submit that the Court should be aware of all the information concerning the transfer before granting authorisation and that, under the 1909 Act, the agreement pursuant to which the transfer is made should be open for inspection to the public.

It was argued by the petitioners that the APA does not constitute the agreement which forms the basis for the transfer, but rather the scheme itself. It was further submitted that the APA is confidential and contains highly sensitive commercial information which, in the wrong hands, could be deployed to undermine the transaction. In this regard counsel for the petitioner pointed out that a number of confidential documents which had been provided by the applicants had been given a wider circulation than agreed or intended. The petitioners claim that the terms of the APA have not yet been completed and that various occurrences detailed in the APA need to transpire in order for the transfer to occur. Accordingly, the petitioners state that the APA is commercially sensitive to the highest degree and should not be made available to the public. If the proposed transfer were to collapse and if QIL went into liquidation, policyholders in QIL would only receive 65% of any sum due to them under any policy as provided by section 3 (1B)(b) of the Insurance Act, 1964.

In making the Scheme and actuarial report available I am satisfied that QIL has complied with the requirements of disclosure in the instant case and that the objectors were given all the information they needed to make the case which they are permitted to make under the 1909 Act. On the facts, CIB have not made out any grounds on which they should be entitled to view the APA.

As regards the second objection, the impact of the transfer on policyholders, CIB argue that the proposed transfer raises significant concerns for policyholders and for every Irish taxpayer. However, the petitioners state that, pursuant to the APA, QIL sought the consent of relevant reinsurers under each relevant reinsurance agreement to the endorsement of Liberty Direct as an additional insured under such reinsurance agreement. QIL has also agreed, pursuant to the APA and subsequent agreements, to reinsure Liberty Direct after the time of the Scheme taking effect to the same extent as QIL is itself reinsured before that time in respect of the risks not endorsed by the policies concerned. The petitioners claim, therefore, that the security provided to the holders of transferred policies by the reinsurance arrangements will not be affected.

The applicable EU Council Directive and the 1994 Regulations and the European Communities (Insurance Undertakings: Accounts) Regulations 1996 require each insurer of the relevant classes of non-life insurance to maintain technical reserves in respect of all of its underwriting liabilities. Each insurer is further required to cover its technical reserves by equivalent assets valued in accordance with rules set out in the 1994 Regulations. Those requirements can now be met. Absent this transfer, they can not be met. Mr. Tulloch, an independent actuary appointed by QIL for the proposed transfer, concluded as follows in his report:-

> "[T]he proposed Transfer is unlikely to have a material adverse impact on the financial security provided to the Remaining Policyholders and Remaining Claimant, based on the analysis set out in this Report.
>
> I have also concluded that the proposed Transfer is unlikely to have a material adverse impact on the Remaining Policyholders and Remaining Claimants in relation to the way in which their policies are managed and administered.
>
> …
>
> I have also concluded that the proposed Transfer is unlikely to have a material adverse impact on the financial security provided to the Transferring Policyholders and Transferring Claimant, based on the analysis set out in this Report.
>
> I have also concluded that the proposed Transfer is unlikely to have a material adverse impact on the Transferring Policyholders and Transferring Claimants in relation to the way in which their policies are managed and administered."

The objectors have failed to point to any impact the proposed transfer would have for the remaining or transferring policyholders and I therefore see no reason to dispute the findings of the independent actuary.

The policyholders staying with QIL (the "stayers") comprise the following groups:-

1) The Quinn (ROI) Non-Life policyholders and claimants retained by QIL as set out in Schedule 10 of the Agreement for Sale agreement;

2) Quinn (Health) Policyholders retained by QIL; and

3) Quinn (Other) Non-Life Policyholders retained by QIL.

QIL have been authorised to make continued application for funds from the ICF that will be available to pay claims from all remaining policyholders and there will be no restrictions or limits on the payments that may be made to remaining policyholders. Despite a diminution of the capital in QIL following the transfer, the addition of funds following successful applications to the ICF will ensure that there are sufficient funds to meet in full, and on a timely basis, the liabilities of remaining policyholders. Further, the entire workforce of QIL is to be transferred to Liberty Direct, and it follows that the way that the process in relation to remaining policyholders is managed will continue into the future.

Stayers are fully protected by the fact that the Minister for Finance, on the recommendation of the Central Bank, has assured the Court that the entire sum for which the Court gave pre-approval will be available. €320 million is required to enable the transfer to take place, and the remaining €418 million will be available to deal with the residual business of QIL. I am satisfied that any objection on the basis that there will be prejudice to either transferring or remaining policyholders is unfounded.

The third objection relates to certain guarantees which affect QIL. Quinn Group Limited availed of certain loan facilities arranged by Barclays Bank in October 2005. QIL also issued certain notes on various occasions between 2005 and 2007. It was a condition of the loan facilities and notes at the time that guarantees would be given by certain subsidiaries within the Quinn group of companies. As part of this arrangement guarantees were given by Quinn Property Holdings Limited, a subsidiary of QIL, involving total liabilities guaranteed of approximately €1.3 billion. As part of the arrangements which include the APA, the guarantees will be released on terms that banks and bondholders holding guarantees over Quinn Property Holding's assets will release these in return for a payment of €200 million.

CIC argue that there is no logical reason why the Joint Administrators should pursue this course of action or that they should do so without first questioning the legality of these guarantees and whether they should attach to QIL.

However, I have evidence and am satisfied that the Joint Administrators have taken legal advice in all relevant jurisdictions in respect of the enforceability of the guarantees, which said guarantees, considering the distressed condition of the Quinn group of companies, have the potential, if called by the banks and bondholders, to render all the guarantors insolvent. The proposed transaction has the effect of preserving the solvency of all of those subsidiaries and releasing assets to QIL. It is not the case that payments relating to the release of guarantees will be made by QIL, but rather that the payments will be funded out of the assets of the relevant subsidiaries.

The fourth objection is that there are excessive reserves in respect of the claims to be transferred from QIL to Liberty Direct and that estimates of what reserves are appropriate has fluctuated significantly and that the Court should therefore make further inquiries of the actuary in this regard.

It is worth recalling that when a claim is made by a policyholder, it is assessed and a reserve placed on it by the insurer. The reserve is reviewed from time to time during the life of the claim and as a result may be increased or decreased. The sum of each of these reserves essentially represents the current expected liability of the insurer's business. When a claim is finalised, any excess reserve over the amount paid out by the insurer is released back to the insurer. Any excess reserve is therefore a profit to the insurer, and any deficit correspondingly represents a loss.

CIB state that, based on figures contained in the petition and supporting affidavits, there has been a significant increase in reserves since the appointment of the Joint Administrators and, as a result, there is an over-reserve in respect of the claims to be transferred to Liberty Direct. CIB argue that, if that is the case, then a significant portion of the value in QIL's business is being transferred to Liberty Direct to the detriment of the taxpayer. CIB assert that this high level of reserves is particularly unusual given the significant decrease in QIL's policyholders during the period of administration. CIB claims that the information which the claims reserve is based upon should be released, and is of the utmost importance to the Court in deciding whether or not to sanction the transfer.

First, it is a well-known fact that reserve estimates of insurers will fluctuate from time to time and the mere fact of fluctuations is not in itself a circumstance or fact which should arouse the Court's suspicions. Much more suspicious would be a scenario whereby over any protracted period of time no fluctuations were reported at all. Perhaps more significantly in the context of the objection, CIB members are all transferring policyholders, and as such are not affected by any alleged over-inflation of reserves. In fact in any such scenario they become beneficiaries.

The Joint Administrators engaged four sets of actuaries during the period of administration, in addition to Grant Thornton and Milliman, who reviewed the data to establish reserves as at 31st December, 2010. The independent actuary has also considered the reserves. I accept their view that the claims reserve estimates reflect the total estimate for claims costs and are appropriate in the circumstances. There is no evidence to suggest that the reserves are inflated. Further, even if it were to be the case that QIL' reserves are overstated, the transaction documents include provisions for a "true-up" or review of claims provisions after closing, in the absence of any agreement as to the level of reserves, to enable any over-estimation by QIL to be recouped within certain limits.

The fifth objection relates to the position of employees under the transfer. In April 2011, the Joint Administrators advised the general public that all 1570 staff of QIL in the Republic of Ireland and Northern Ireland would transfer to Liberty Direct. CIC allege that QIL's insurance business is significantly reduced and that this is as a result of existing policyholders not wishing to reinsure with QIL because of the involvement of Anglo Irish. CIC argue that Anglo Irish should not be a party to this transaction and that their involvement endangers the position of employees.

I heard evidence from Mr. Smith, an employee of QIL who is the chairman of the Employee Representative Board. He stated that the vast majority of employees in QIL's three main offices want the transaction to go ahead and are anxious to retain their employment. He further stated that no employee has voiced any concern as regards the transfer through official channels. I accept his evidence as truthful and representative of the overwhelming majority of QIL employees.

No objector has been able to identify any employee who is concerned about their employment position under the transfer. In the circumstances, I am satisfied that there is no evidence before the Court of any danger presented by the transaction to the position of employees. I am fortified in my conclusion on this aspect of the case by the specific application to this transfer of the Regulation earlier specified which carries over employees contractual and pension entitlements. No breach of that Regulation has been identified.

Overall I am satisfied that the transfer preserves the position of employees, policyholders and the business as it currently stands, whereas the alternative to this transfer would be to allow QIL to go into liquidation, which would result in massive job losses and further catastrophic losses to the local community.

I am keenly aware that the proposed transfer might not be the most perfect or most ideal solution to the enormous difficulties which befell this company. However, the transfer and new company represent a floating ship in turbulent seas where shipwreck and abandonment appeared to be the only other alternatives for QIL, its employees and policyholders. I am mindful therefore of the old saying which declares that "*when needs must, the Devil drives*". Even if this consideration was not present, I am satisfied for the reasons detailed in this judgment that the objections, while keenly felt and bona fide held, are ultimately without substance. The foundations and structure of the transfer appear to me to be sound and well thought out. I make no apology for stating that I am strongly influenced by the fact that the Minister for Finance and his departmental officials, having been put in possession of all relevant information, have given their assent and approval to the transfer. The Minister will further ensure that those pre-conditions which relate to his remit are met and that appropriate funding is provided to capitalise Liberty Direct and to achieve appropriate technical reserves and solvency margins. I am also taking into account the clear terms of the outline approval from the Central Bank, the EC Commission approval, the withdrawal of objection by the regulatory body for solicitors in England and Wales, the evidence given on behalf of the overwhelming majority of employees and my own findings in respect of the likely effect on policyholders and employees of this transfer.

I will therefore approve the Scheme and will hear counsel in relation to any further or other orders which may require to be made.