

DISTINGUISHING THE FACTS OF THE LEGAL & GENERAL PART VII TRANSFER

*Approval suggests interventionist approach taken in
Prudential/Rothesay Life could be limited*

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The recent High Court approval of a Part VII transfer between Legal & General Assurance Society (LGAS) to ReAssure suggests the interventionist approach the court adopted in the Prudential Assurance Company to Rothesay Life transfer could be limited in its scope to the facts of that case.

In August last year the High Court declined to sanction the Part VII transfer of a large annuities book from Prudential to Rothesay, despite the independent expert's view the transfer would not have a material adverse effect on policyholders and the Prudential Regulation Authority and Financial Conduct Authority not objecting to it.

The deciding judge, Justice Snowden, examined whether the commercial rationale for the transfer (that is, the release of regulatory capital to support the demerger of Prudential Group's UK and European businesses) outweighed the impact on policyholders. In a shift from previous judgments, Snowden J decided against sanctioning the transfer, a decision that shocked the insurance industry, leading to speculation it could prohibit annuity transfers between insurers and make the transfer of any long-term business very challenging.

NO BROADER PRECEDENT

The August 2020 decision in LGAS/ReAssure, however, handed down by Justice Zacaroli, indicates Snowden J's conclusions in Prudential/Rothesay do not necessarily constitute a broader precedent beyond the facts of that case. As no two cases are the same, a detailed comparison with circumstances of other cases has limited utility. This should relay industry concerns on the Part VII market, provided applicants can distinguish their transfers from the particular facts of the Prudential/Rothesay transfer.

In distinguishing the facts, Zacaroli J highlighted three important differences. First, LGAS annuities were less than 1% of the total number of policies transferred, while in Prudential/Rothesay the transfer involved a large transfer of annuities and this emphasised policyholder protection arguments, which Snowden J sided with.

Second, the motivation for the LGAS transfer was a strategic reorganisation of its business, with Zacaroli J saying the Part VII transfer would provide a better

outcome for affected policyholders rather than remaining with a company whose strategic focus is elsewhere. The motivation for the transfer is an important distinction from the Prudential/Rothesay transfer, where the primary motivation (regulatory capital benefits) was not considered essential and was satisfied in large part by the reinsurance arrangements already in place.

Third was the issue of parental support, with Zacaroli J in LGAS/ReAssure taking comfort from ReAssure being part of a large and well-capitalised group, which would continue to be so following its sale from Swiss Re to Phoenix. Snowden J in Prudential/Rothesay put significant weight on the Prudential history, brand and the parental guarantee, when compared to Rothesay, as transferee.

Even though each transfer is considered on its own merits, the two court decisions will mean the parties and independent experts need to commit more time and resource in pre-empting the concerns of policyholders and the court, especially where life and pensions business is being transferred out of established and well-known insurance groups.

JUDICIAL FOCUS

That said, Zacaroli J's judgment in LGAS/ReAssure is helpful as it outlines areas of judicial focus in future Part VII schemes, such as the importance of protecting service levels following the transfer. It also shows applicants should expect to receive well-informed policyholder objections and the common themes that are arising in these processes should be considered and addressed.

The judgment should not be seen, however, as suggesting the decision in Prudential/Rothesay was not correct. The facts were distinguishable and Zacaroli J steered well clear of any criticism of the conclusions reached in the earlier case. The analysis of the Prudential/Rothesay decision will come soon, as the Court of Appeal will hear the case in an expected three-day appeal starting on October 27.

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