In the High Court of New Zealand
Wellington Registry
I Te Kōti Matua O Aotearoa
Te Whanganui-ā-Tara Rohe

CIV-2025-485-

in the matter of: a scheme of arrangement under Part 15 of the Companies Act 1993

and: **Foundation Life (NZ) Limited**

Applicant

Memorandum of counsel for applicant in relation to application (without notice) for initial orders under Part 15 of the Companies Act 1993

Dated: 27 February 2025

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MEMORANDUM OF COUNSEL FOR APPLICANT IN RELATION TO APPLICATION (WITHOUT NOTICE) FOR INITIAL ORDERS UNDER PART 15 OF THE COMPANIES ACT 1993

May it please Your Honour:

1 The applicant, Foundation Life (NZ) Limited (**Foundation Life**), seeks initial procedural orders for approval of a scheme of arrangement under Part 15 of the Companies Act 1993 (the **Scheme**). The Scheme would rearrange the rights of approximately 27,588 life insurance policyholders with participating "Whole of Life" or "Endowment" policies issued by Foundation Life. (The various numbers of policyholders set out in this memorandum are as at 31 December 2024).

APPLICATION

2 The documents before the Court relevant to the application for initial orders are:

2.1 originating application;

2.2 interlocutory application (without notice);

2.3 affidavit of Timothy Charles Sole; and

2.4 bundle of authorities.

3 This memorandum covers:

A. Part 15 of the Companies Act 1993;

B. the reasons for the Scheme, and what the Scheme will achieve if approved, under the heading "Reasons for and Effects of the Scheme";

C. the usual procedure for seeking initial orders under section 236 of the Companies Act 1993, under the heading "Procedure";

D. the initial orders Foundation Life is seeking, which will govern its notification, meeting and voting processes, under the heading "The Proposed Initial Orders"; and

E. class composition.

A. PART 15 OF THE COMPANIES ACT 1993

4 While the Court is not, at this stage, required to determine the substantive application, it is nevertheless appropriate for the Court to consider whether the Scheme is *capable* of being approved should the requisite resolution (**Resolution**) be passed.

5 A copy of Part 15 of the Companies Act 1993 is at **Tab 1** of the bundle of authorities.

The Court's discretion

6 The Court has a broad discretion to approve schemes, limited only by the policy and purposes of the Companies Act.[1] The key considerations are whether:[2]

6.1 there had been compliance with the statutory provisions in the course of the process;

6.2 the scheme had been fairly put to the class or classes concerned, and whether sufficient information was provided to those affected to judge and vote upon the arrangement;

6.3 the scheme was such that an intelligent and honest business person, a member of the class concerned, and acting in respect of that interest, might reasonably approve it; and

6.4 the proposal is "fair and equitable".[3]

B. REASONS FOR AND EFFECTS OF THE SCHEME

The Policies

7 Foundation Life's participating business comprises approximately 27,588 participating policyholders who hold either a participating "Whole of Life" policy (approximately 26,900 policyholders) or a participating "Endowment" policy (approximately 688 policyholders) (together, the **Policies** and the **Policyholders**).[4] (The term "participating" refers here to the Policyholders' participation in the statutory investment fund, not their participation in the proposed Scheme.)

8 Participating Whole of Life and Endowment Policies are essentially the same in terms of benefits to Policyholders. Both mature at a certain date unless death or terminal illness occurs prior. Whole of Life Policies mature at age 95. Endowment Policies mature at an age chosen by the Policyholder.

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1 *Weatherston v Waltus Property Investments Limited* [2001] 2 NZLR 103 (CA) at 112 (**BoA Tab 13**).

2 *Re Lifetime Income Ltd* [2022] NZHC 810 at [37]–[38] (**BoA Tab 7**). See also *Re C M Banks Limited* [1944] NZLR 248 (SC); *Re Milne & Choyce Limited* [1953] NZLR 724 (CA).

3 *Weatherston v Waltus Property Investments Limited* [2001] 2 NZLR 103 (CA) (**BoA Tab 13**). See also *Re ACS (NZ) Ltd* [2012] NZHC 1396 (**BoA Tab 4**) and *Re PrefSure Life Ltd* HC Auckland CIV-2004-404-6066, 5 November 2004 (**BoA Tab 9**) of application of the test in an insurance context.

4 **Appendix 7** of the Explanatory Statement (**Exhibit 1** to Sole affidavit).

9 In addition to providing Policyholders with life insurance, "participating" Policies also function as an investment. Policyholders' premiums are invested in a fund managed by Foundation Life which forms part of its statutory fund (**Participating Fund**), and Policyholders share in the profits of the investment through the declaration of annual and additional bonuses by Foundation Life.

Rationale for the Scheme

10 A strategic review of the Policies by Foundation Life's directors identified a number of structural limitations to the Policies. They are outlined in the affidavit of Timothy Charles Sole and in Section 4 of the Explanatory Statement annexed to Mr Sole's affidavit.

11 Foundation Life considers that the proposed Scheme is the best approach for providing improved value and more flexibility to Policyholders.

12 The Scheme has been developed by Foundation Life with the assistance of its Appointed Actuary (appointed for the purpose of s 78 of the Insurance (Prudential Supervision) Act 2010) and a number of external experts.

How the Scheme will work

13 This memorandum uses a number of defined terms, the definitions of which are set out in the proposed Scheme Terms.

14 If approved, the Scheme will work as follows:

14.1 ***Policyholders bound by the Scheme:*** The Scheme will bind the **Eligible Policyholders**, being those Policyholders who hold a Current Policy at 5.00pm on the Record Date.

A Current Policy is a Participating Whole of Life Policy or Participating Endowment Policy that:

(a) has not had a Final Claim Event (death or terminal illness claim that would exhaust the policy), on or before 5.00pm on the Record Date; and

(b) has not been surrendered or lapsed on or before 5.00pm on the Record Date; and

(c) has a fixed Maturity Date which is scheduled on or after the Effective Date.

Where an Eligible Policyholder has transferred the Eligible Policyholder's Current Policy after 5.00pm on the Record Date but before 5.00pm on the Choice Date, the Eligible

Policyholder of the Current Policy shall, after the transfer is effected, be the new Policyholder of the Current Policy.

Where an Eligible Policyholder has died after 5.00pm on the Record Date and before the Effective Date, the Eligible Policyholder of the Current Policy shall, after such death, be the executors of the deceased policyholder's estate.

14.2 ***Conversion of Policy to replacement life insurance/cash:*** The Scheme will convert the Current Policy of each Eligible Policyholder resident in New Zealand into one of the following, at their choice:

(a) Replacement Cover provided by Chubb Life Insurance New Zealand Limited (**Chubb Life**) with a guaranteed amount of life cover that will, at the Effective Date, be 5% higher than the Current Policy's Death Benefit (and in some cases more), for which no further premiums need to be paid. Some Eligible Policyholders will also receive a payment of the balance of their Policy Value from Foundation Life;

(b) a Cash Payment that will at the Effective Date be a minimum of 5% higher than the Current Policy's Surrender Value, capped at the Current Policy's Death Benefit; or

(c) a combination of life cover and cash, reflecting either (at the Eligible Policyholder's choice):

(i) two thirds Replacement Cover and one third cash; or

(ii) one third Replacement Cover and two thirds cash;

14.3 Eligible Policyholders resident in New Zealand will be asked to use the benefit choice form sent to them to choose one of the options set out above by a stipulated deadline (the **Choice Date**).

14.4 Eligible Policyholders resident in New Zealand who do not make a choice by the Choice Date, would default to receiving:

(d) Replacement Cover, if they are a Whole of Life Policyholder; or

(e) a cash payment, if they are an Endowment Policyholder;

14.5 Overseas Eligible Policyholders (whose postal addresses are recorded in Foundation Life's policyholder register as being outside New Zealand) will receive the Cash Payment option. Alternatively, Overseas Eligible Policyholders may, by 5.00pm on the Choice Date, transfer ownership of their Current Policy to someone who is a New Zealand resident, so the new Policyholder can access the insurance options from Chubb Life in respect of the Life Insured.

14.6 ***Determination of individual Policyholders' entitlements:*** To implement the Scheme, the Appointed Actuary has assisted Foundation Life to calculate estimated Scheme policy values for each Eligible Policyholder using a sophisticated model.[5]

Conditions

15 In order to become binding, the Scheme requires:

15.1 A successful vote at the Scheme Meeting (as set out in more detail in the Proposed Initial Orders section below); and

15.2 The approval of the Court.

16 The Scheme Terms also include, as a condition, that all regulatory approvals, consents and other acts that are necessary to implement the Scheme are obtained from the relevant regulatory authorities on or before 9.00am on the date on which the Court hears the Application for Final Orders. That condition is included out of caution. Foundation Life considers that the Scheme itself does not require any regulatory approvals.

17 In particular, the Scheme does not require approval from the Reserve Bank of New Zealand under s 44(1)(a)(ii) of the Insurance (Prudential Supervision) Act 2010. That is because it does not involve a "transfer" of an insurance business, or part of an insurance business. It merely involves a cancellation of Foundation Life's participating policyholder liabilities existing at 5.00pm on the Record Date, in return for Replacement Cover or the Cash Payment.

18 While Foundation Life does not require the Reserve Bank's approval for the Scheme, Foundation Life has nonetheless consulted with the Reserve Bank and has given it a copy of the documents relating to the Scheme in advance. The Reserve Bank has written to Foundation Life with certain comments on the Scheme. That letter is **Exhibit 7** to Mr Sole's affidavit. In summary, and without approving or endorsing the Scheme itself, the Reserve Bank is aware that the Scheme will be put to Eligible Policyholders. It has

[5] **Section 1.3** of the Explanatory Statement (**Exhibit 1** to Sole affidavit).

no suggested further amendments or additions to make to the Scheme proposal documents. It asks that its letter be drawn to the attention of the Court.

19 For completeness, Foundation Life has sought and obtained, under ss 44 and 53(2) of the Insurance (Prudential Supervision) Act 2010, the Reserve Bank's approval for the transfer to Chubb Life, and the assignment and allocation to Chubb Life of liabilities in respect of:

19.1 Foundation Life's non-participating life insurance business; and

19.2 the unpaid claims in respect of Foundation Life's participating life insurance business following the Effective Date of the proposed Scheme.

20 Those transfers are outside of the Scheme. The RBNZ's approval is not conditional on the Scheme going ahead. However, the transfers will go ahead only if the Scheme is approved and implemented.

Sufficient Assets Condition

21 Following the Choices made by Eligible Policyholders (described in 14.2 and 14.3 above), the obligation on Foundation Life to make the various cash payments, and to procure Chubb Life to provide the Replacement Cover, is triggered only when the condition in clause 5.2 of the Scheme Terms is met. That is, the Scheme will not proceed unless, in Foundation Life's reasonable opinion, the Participating Assets are sufficient to pay Chubb Life's premium, Policyholders' payments, the Shareholder's entitlement and other liabilities of the Participating Fund on the Effective Date. This condition is to ensure that the Scheme is viable in light of the choices made by the Eligible Policyholders. That cannot be known in advance. Foundation Life has until the Effective Date to satisfy this condition.

The Scheme is capable of being approved

22 The Scheme is capable of being approved in due course:

22.1 It is designed to address structural limitations identified in respect of Foundation Life's Policies that have arisen because of a range of factors described in Section 4 of the Explanatory Statement.

22.2 The Appointed Actuary has provided advice to Foundation Life in relation to the Scheme. He has also assisted Foundation Life to calculate the estimated Scheme option values for each Eligible Policyholder. His report offers his opinion that the Scheme is in

Eligible Policyholders' individual and collective best interests.[6]

22.3 The Independent Actuary has also prepared a report.[7] It offers his opinion that the Scheme is fair and equitable for Eligible Policyholders.

C. PROCEDURE

23 Orders under Part 15 are sought at two distinct stages:

23.1 First, procedural orders, including orders concerning notice of the application, class composition, meetings and the ability to be heard on the application for final orders sanctioning the scheme;[8] and

23.2 Second, orders sanctioning the Scheme if it has been approved by the Eligible Policyholders.

24 The Court has a broad discretion in respect of the initial procedural orders, limited only by the policy and purposes of the Companies Act.[9]

Difference between the two stages

25 The proponent of the scheme must ensure that the initial orders are correctly made. New Zealand courts historically have not scrutinised the substance of the initial orders.[10] However, issues concerning the composition of classes (and other substantive issues) should be identified and, if appropriate, resolved early in the proceeding.[11]

26 Doing so is necessary to avoid the waste of cost and court time illustrated in *Re Hawk*. In that case, the Court at the first stage approved the creditors being treated as a single class. The meeting of creditors proceeded on that basis. But the Court subsequently held that the creditors could not be treated as a single class, and accordingly the Court did not have jurisdiction to sanction the scheme.

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6 Appointed Actuary's full report (E**xhibit 5** to Sole affidavit) at [1.1], [1.8], [9.7], [11.1] and [11.13].

7 Independent Actuary's report (**Exhibit 6** to Sole affidavit).

8 Companies Act 1993, s 236(2) (**BoA Tab 1**).

9 See *Weatherston v Waltus Property Investments Limited* [2001] 2 NZLR 103 (CA) at [31] (**BoA Tab 13**).

10 *Dominion Income Property Fund v Takeovers Panel* (2006) 3 NZCCLR 946 (CA) at [22] and the authorities cited therein (**BoA Tab 3**).

11 *Re Hawk Insurance Company Ltd* [2001] BCLC 480 (**BoA Tab 5**); *Practice Statement* (Companies: schemes of arrangement) [2002] 3 All ER 96. See also Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (online ed, LexisNexis NZ) at [16.33] (**BoA Tab 14**).

27 An English practice then developed requiring notice to be given to any person affected by the scheme of the first hearing, the scheme's purpose, the meetings of creditors which the applicant considers will be required, and their composition.[12]

28 In this case, inviting Eligible Policyholders to participate in the first hearing could be costly, confusing and even wasteful.[13]

29 For that reason, this application is made without notice. This is consistent with the approach taken in other cases in New Zealand, both under s 236 of the Act and under its predecessor provision, s 205 of the Companies Act 1955. Eligible Policyholders will be free, at the second hearing, to raise any issue about class composition or other matters related to the conduct of the meeting.

30 However, to minimise the risk that the meeting is inappropriately constituted, Foundation Life asks the Court to consider in a substantive way the issues around class composition addressed in this memorandum.

31 First, however, this memorandum sets out Foundation Life's proposed procedure.

D. THE PROPOSED INITIAL ORDERS

32 Foundation Life proposes the following procedure in relation to the distribution of materials, the Scheme Meeting and the next Court Hearing:

32.1 Personal service is to be dispensed with;

32.2 Instead, Policyholders are to be notified of the Scheme by a physical mail-out comprising:

(a) a covering letter, including an estimate to each Eligible Policyholder of the Sum Insured and Cash Payment ("Sum Insured" and "Cash Payment" as defined in the Scheme Terms) of the options available to that Eligible Policyholder under the Scheme;

(b) an Explanatory Statement, including a notice of Scheme Meeting, including the resolution to be voted on, the Scheme Terms, summaries of the Appointed and Independent actuaries' reports, a

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12 Practice Statement (Companies: schemes of arrangement) [2002] 3 All ER 96, at [4].

13 Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (online ed, LexisNexis NZ) at [16.33] (**BoA Tab 14**).

copy of the replacement policy document and an explanation of where to find a set of documents and information known as the "Further Materials"; and

(c) a voting/proxy form,

(together, the **Policyholder Materials**);

32.3 The covering letter and Explanatory Statement will contain reference to a website, www.foundationlife.co.nz/scheme-of-arrangement, which will contain copies of the Further Materials, being:

(a) a copy of the Policyholder Materials (except the covering letters to individual Eligible Policyholders);

(b) templates of each form of covering letter sent to Eligible Policyholders which, to avoid doubt, shall contain no information about any individual Eligible Policyholder;

(c) a copy of the Appointed Actuary's full report;

(d) a copy of the Independent Actuary's full report; and

(e) all documents filed in this Court;

32.4 Accidental failure to send such materials to any Policyholder, or the non-receipt of such materials by any Policyholder, or the fact that Foundation Life does not hold current address details for certain Policyholders, will not invalidate the process, but if any such failure or omission is brought to the attention of Foundation Life, then it shall endeavour to rectify it by the method and in the time most reasonably practicable in the circumstances;

32.5 Foundation Life is permitted, prior to the Record Date, to make amendments, revisions and/or supplements to the Policyholder Materials and Further Materials. Should Foundation Life make any material amendments, revisions and/or supplements to the Scheme or the Resolution after the Policyholder Materials have been sent to Policyholders, it will notify Policyholders of such changes by way of advertisement in major metropolitan newspapers and announcements at www.foundationlife.co.nz/scheme-of-arrangement;

32.6 Any Eligible Policyholder wishing to be heard by the Court in opposition to the Scheme is to file in the Wellington High Court and serve on Foundation Life, at the address for service shown on the originating application, a notice of

opposition or notice of appearance, and any evidence by 5:00pm, 5 working days before the hearing;

32.7 Any person other than an Eligible Policyholder wishing to be heard by the Court is to file and serve an application for leave to be heard, a notice of opposition or notice of appearance, and any evidence by 5:00pm, 5 working days before the hearing

32.8 A meeting of Eligible Policyholders is to be held at Eden Park, World Cup Lounge West, Level 4, Samsung South Stand, 42 Reimers Avenue, Kingsland, Auckland on 9 June 2025 at 2:00pm and is to be advertised in advance on a website and in the main New Zealand daily newspapers;

32.9 All Eligible Policyholders shall vote on the Scheme as a single class;

32.10 As set out in [14.1] above, for a policyholder to be an Eligible Policyholder, their policy's fixed maturity date must be on or after the Effective Date. That date is expected to be 1 September 2025 (and must not be earlier than that date). For the purpose of determining who can vote on the Scheme, the Effective Date shall be taken to be 1 September 2025. If for some reason the actual Effective Date is delayed, policyholders whose polices mature between 1 September 2025 and the actual Effective Date will not be bound by the Scheme. These Policyholders will instead receive the benefits they are entitled to under their Current Policy and any Rider Benefits they may hold, even if they voted on the Scheme.

32.11 The Resolution shall be approved if Eligible Policyholders voting "for" the Scheme:

(a) are more than 50% in number (assuming 1 vote per Policy) of the Policies held by Eligible Policyholders who vote; and

(b) represent not less than 75% in value of the Policies held by Eligible Policyholders who vote. For this purpose, the value of a Policy will be the Surrender Value of that Policy as at the Record Date,[14]

[14] The Independent Actuary has said that his view is that Surrender Value is a fair measure of value for voting purposes. See the Independent Actuary's report (**Exhibit 6** to Sole affidavit) at page 19.

so as to align with the majorities required for compromises under Part 14 and deeds of company arrangement under Part 15A;

32.12 James Ogden, director of Foundation Life, or his nominee, will act as chairperson of the meeting;

32.13 The meeting is otherwise to be conducted in accordance with Schedule 5 of the Companies Act ("Proceedings at Meetings of Creditors"), provided that references to postal votes shall include votes delivered by electronic means;[15]

32.14 Foundation Life shall report by affidavit to the Court following the meeting;

32.15 As part of its initial procedural orders, the Court will schedule a date to hear the application for final orders approving the Scheme. The applicant respectfully requests a hearing date as early as possible after 16 June 2025, being seven days after the Scheme Meeting. Only parties who file a notice of appearance or notice of opposition to the Application for Final Orders in accordance with the above directions will be entitled to appear at the hearing (in addition to Foundation Life), leave being required if not an Eligible Policyholder; and

32.16 Following that hearing, Foundation Life will write again to Eligible Policyholders advising them of the outcome of the hearing.

Moratorium

33 Foundation Life also seeks a form of moratorium on claims and surrender applications during the period from the Record Date to the Scheme Approval Date.

34 Under the Scheme Terms (cl 3.9), a claim by an Eligible Policyholder arising from a Final Claim Event, or a request from an Eligible Policyholder to surrender a policy, where either occurs between the Scheme Approval Date and the Effective Date, is not to be paid until the amount of the claim / surrender amount can be determined under the Scheme.

35 There is an exception. Foundation Life may agree with the Eligible Policyholder that the pre-Scheme contractual entitlement is to be paid in full satisfaction of any Scheme Entitlement.

36 The purpose of the direction sought at 1.14 and 1.15 of the application is to extend those provisions so that they cover the

[15] Companies Act 1993, Sch 5 "Proceedings at Meetings of Creditors" (**BoA Tab 2**).

period between the Record Date and the Scheme Approval Date. After that date, the Scheme Terms govern the position. There is therefore no further need for a direction from the Court.

37 In addition, Foundation Life seeks leave to apply at short notice to vary these orders or apply for further orders as may be appropriate.

Timeline

38 A timeline of the entire approval process is set out at page 23 of the Explanatory Statement. The six key milestones are:

Step	Indicative Date
First Court Hearing - the date on which Foundation Life obtained Initial Court orders for the Scheme.	Date on which the Court hears/determines the application for initial orders.
Record Date – three Business Days prior to the date of the Scheme Meeting. This is the date on which 5.00pm is the time for determining who are the Eligible Policyholders who can vote on the Scheme, and which Current Policies will be covered by the Scheme if the Scheme is approved.	4 June 2025.
Scheme Meeting Date	9 June 2025.
Scheme Approval Date – the date of the decision from the Second Court hearing at which the Scheme is approved by the Court and, if approved, the date on which the Scheme Terms are binding on all Eligible Policyholders and Foundation Life.	The date on which the Court issues its decision (assuming that the Court approves the Scheme).
Choice Date - last date (by 5.00pm) on which: • NZ Resident Eligible Policyholders can choose which Scheme option they receive; • Eligible Policyholders (including Overseas	The date notified to Eligible Policyholders by Foundation Life, expected to be approximately 7 weeks after the Scheme Approval Date.

Eligible Policyholders) can complete the transfer of the ownership of their Current Policy to a new Policyholder; and • Eligible Policyholders can repay any Policy Debt to Foundation Life.	
Effective Date – date on which life cover under the Replacement Policies starts and the date at which Foundation Life will calculate the actual: (a) Policy Values for Eligible Policyholders, from which their cash options will be calculated; (b) Sum Insured for Replacement Policies; and (c) premium to be paid by Foundation Life to Chubb Life for the issue of the Replacement Policies, and the replacement benefits for the Rider Benefits.	Commencement of the day notified to Eligible Policyholders as the Effective Date by Foundation Life. This date cannot be earlier than 1 September 2025, and is expected to be approximately 4 weeks after the Choice Date. For the sole purpose of determining who can vote on the Scheme, the Effective Date shall be taken to be 1 September 2025.

E. CLASS COMPOSITION

39 The classic guidance on classes of creditors is that a "class" must be confined to "*those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*."[16] Where creditors can "*consult together with a view to their common interest*" they should be required to, lest by ordering separate meetings the Court gives veto to a minority group.[17]

40 A majority of the Supreme Court held in *Trends Publishing* that those proposing a compromise are entitled to take a broad approach.[18] A complete identity of rights and interests is not required within a class. If all creditors aim to maximise the return on their debts and can be expected to vote accordingly, differences between them will not really matter. Where creditors, despite

16 *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC* [2024] EWCA Civ 24, [2024] Bus LR 745 at [109] (**BoA Tab 11**). See also *Sovereign Life Assurance Co (in liq) v Dodd* [1892] 2 QB 573 (**BoA Tab 10**).

17 *Re Hawk Insurance Co Ltd* [2002] BCLC 480 (**BoA Tab 5**).

18 *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZSC 62, [2018] 1 NZLR 903 at [66] (**BoA Tab 12**).

differences in commercial interests or legal rights, can be expected to vote on the basis of a "class-promoting view", they should be classed together.[19]

The present application — class considerations

41 In preparing the Scheme, Foundation Life has considered the following issues in relation to class. None of these issues requires separate meetings or classes.

42 The Independent Actuary has also considered whether there should be more than one class. He notes that every policy owner is different to another in some sense, but that all have a mutual interest in the participating fund and its operation. In his opinion, it would be arbitrary to have different classes. One class is fair.[20]

43 The reasons for having a single class are explored further below.

Whole of Life vs. Endowment Policyholders

44 The Policies to which the Scheme relates are participating "Whole of Life" and "Endowment" life insurance policies.

45 Participating Whole of Life and Endowment Policies both mature at a certain date unless death or terminal illness occurs prior. Whole of Life Policies mature at age 95. Endowment Policies mature at an age chosen by the policyholder.

46 The difference between Whole of Life and Endowment Policies does not justify the creation of separate classes of Eligible Policyholders. The relative positions of Eligible Policyholders holding Whole of Life and Endowment Policies means they can still consult together with a view to their common interest:

46.1 The legal position of Eligible Policyholders holding Whole of Life and Endowment Policies is the same. The only difference is that Eligible Policyholders have rights to different sums insured, which are payable at different times. The difference is not one of rights but of value. The situation is analogous to creditors voting in a debt compromise. While creditors may have different amounts of debt, this alone does not mean that the nature of their *rights* are different;

46.2 The commercial interests of Eligible Policyholders' Whole of Life and Endowment Policies are the same. All Eligible Policyholders are at arm's length from Foundation Life. Both groups, presumably, want more flexibility and to receive improved value compared to the benefits offered

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19 *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZSC 62, [2018] 1 NZLR 903 at [66] (**BoA Tab 12**).

20 See the Independent Actuary's report (**Exhibit 6** to Sole affidavit) at page 19.

under their respective Policies. The Scheme allows this for both groups.

Policies nearing maturity vs. Policies with a long time to maturity

47 Foundation Life considered the difference between those Eligible Policyholders whose Policies are nearing maturity and those whose Policies are not.[21]

48 Eligible Policyholders should vote as a single class. In comparing Policies nearing maturity to those further away from maturity, again, the distinction is one of value, rather than rights or interests.

Fully paid-up Eligible Policyholders (i.e. those Eligible Policyholders who are no longer required to pay premiums) vs. those with future premium obligations

49 Some Eligible Policyholders, with Foundation Life's agreement, have ceased paying premiums so that their policies have become paid-up policies (**PUPs**). Foundation Life agreed with holders of PUPs that while their life cover would continue, they would receive a reduced level of death benefit under their Policy, and in return would no longer be required to pay premiums. The changed death benefit is based on an actuarial calculation of the Policy's value, and reflects a number of variables (for example, the existing duration of the Policy and the term to maturity).

50 Again, the distinction between holders of PUPs and other Eligible Policyholders is one of value only. The value of each Eligible Policyholder's rights (holders of PUPs and others) will be fully accounted for in the individualised "Policy Value" figure and, for those who receive a Replacement Policy (as defined in the Scheme Terms), "Sum Insured" figure. Holders of PUPs are able to consult with other Eligible Policyholders to determine whether to vote in favour of the Scheme.

Differences in Policy wording

51 The Policies were sold by Foundation Life across approximately seven decades.[22] The documentation and wording of Policies naturally changed across that time period.

52 While different Eligible Policyholders may have different forms of Policy documentation because that documentation has evolved over the years, the purpose of the Policies has remained the same: to insure the lives of individuals with an investment component. The wording of Policies does not impact upon the fundamental elements of each Policy: that an Eligible Policyholder is entitled to payment on the happening of a specified event, and how that

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21 Affidavit of Timothy Charles Sole affirmed 27 February 2025 at [57].

22 Affidavit of Timothy Charles Sole at [57].

payment is calculated.[23] Slight variances in those elements from Policy to Policy do not create a distinction in rights as between Eligible Policyholders, and do not prevent them from consulting together on the Scheme. Accordingly, no class issue is created.

Policy Rider Benefits

53 As at 31 December 2024, 190 of the Policies include rider benefits, separate from the primary obligations of Foundation Life.[24] The holders of the riders pay additional annual premiums for their benefits. The majority of the riders (with one exception) fundamentally provide for either guaranteed insurability or term life insurance cover. Specific details about each of the Rider Benefits are set out in Mr Sole's affidavit, and in **Appendix 7** of the Explanatory Statement under the heading "Rider Benefits".

54 If the Scheme is approved, the Eligible Policyholders resident in New Zealand who receive a Replacement Policy from Chubb Life will have the option to choose replacement benefits on terms at least as good as the Rider Benefits. Eligible Policyholders will not be required to pay any further premiums to maintain replacement benefits. Alternatively, Eligible Policyholders with existing Rider Benefits will also be offered the cash value of their Rider Benefits.

55 Eligible Policyholders resident in New Zealand who have Rider Benefits, but choose to convert their Policy into cash, will receive the cash value of their Rider Benefit.

56 The Scheme will bring about no changes for Eligible Policyholders with Rider Benefits who want to retain them, save that the replacement benefits will be provided by a different insurer and the conversion options under some Rider Benefits allowing for a new Whole of Life or Endowment Policy to be issued will no longer be available. Accordingly, there is no difference in rights and interests between Eligible Policyholders with Rider Benefits and Eligible Policyholders without, and they are not prevented from consulting together on the Scheme.

Matured Policies vs. outstanding Policies (i.e. vested vs. contingent)

57 A classic distinction in schemes affecting an insurance company's policyholders is between those policyholders with policies that have matured or claims that have crystallised in some other way, and those policyholders whose claims remain contingent.[25] The former hold accrued rights. The latter hold contingent rights. This was

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23 Affidavit of Timothy Charles Sole at [64].

24 Affidavit of Timothy Charles Sole at [66].

25 But see the majority's observation in *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZSC 62, [2018] 1 NZLR 903 at Note 34 (**BoA Tab 12**).

the distinction that required different classes in *Sovereign v Dodd*.[26]

58 The Scheme will bind only those Policyholders who hold a Current Policy on the Record Date, being a policy:

58.1 in respect of which a Final Claim Event has not occurred;

58.2 which has not lapsed nor been surrendered before the Record Date; and

58.3 which has a fixed Maturity Date which is scheduled on or after the Effective Date.

59 On the date of the meeting, therefore, all of the policyholders entitled to vote will be in the same position in that all of their polices will be current. None will have matured into fixed claims against the insurer.

60 If the Effective Date is, for any reason, delayed from the expected date of 1 September 2025, a small number of persons who voted may no longer be an Eligible Policyholder bound by the Scheme. That will occur where their policy's schedule maturity date is between 1 September 2025 and the actual Effective Date. That does not create a class issue as those persons are not known as at the date of the vote. They remain capable of consulting with all others entitled to vote.

61 The Effective date cannot be earlier than 1 September 2025, so there is no possibility that persons affected by the Scheme are precluded from voting due to a change in the actual Effective Date.

62 The period between the Record Date and the Effective Date (when cover under the Replacement Policies starts) is expected to be around 12 weeks. During this time, there may be lives insured who die and Terminal Illness claims which are accepted by Foundation Life.

63 As set out in Mr Sole's affidavit at [76] to [81], the Scheme contains mechanisms to ensure that Eligible Policyholders are given the Scheme's opportunities if the Scheme is approved and fully implemented, and a claim occurs and is reported between the Record Date and the Effective Date.

64 While there is a difference between the cash amount payable to an NZ Resident Eligible Policy Holder and an Overseas Eligible Policyholder in that situation, that does not create any need for a separate class. As above, the persons affected cannot be known as at the date of the vote at the Scheme Meeting. In any event,

[26] *Sovereign Life Assurance v Dodd* [1892] 2 QB 573 (**BoA Tab 10**).

any Overseas Eligible Policyholder will have the opportunity to transfer their policy to a New Zealand resident so as to benefit from the Scheme as an NZ Resident Eligible Policy Holder.

Overseas based Policyholders

65 Some participating Policyholders are based overseas. There are approximately 1,440 overseas-based Policyholders in Australia, 255 Policyholders in the United Kingdom, 120 in the United States, 45 in Canada, and then approximately 150 in other jurisdictions such as the Netherlands, Hong Kong, Germany and Malaysia.[27]

66 Overseas Eligible Policyholders are entitled to vote on the Scheme.

67 However, for regulatory reasons, Chubb Life (a New Zealand licensed life insurer) is not able to offer a Replacement Policy (as defined in the Scheme Terms) to Overseas Eligible Policyholders. Instead, Overseas Eligible Policyholders will automatically receive the cash payment option, same as all other Eligible Policyholders who receive the cash only option.

68 Alternatively, Overseas Eligible Policyholders can arrange to transfer their Policy to a person (or persons) who is resident in New Zealand. This would allow the new Policyholder to access the insurance options from Chubb Life if the Scheme is approved. All Policy transfers must be completed by the Choice Date.

69 Foundation Life acknowledges that Chubb Life's inability to offer Replacement Policies directly to Overseas Eligible Policyholders means Overseas Eligible Policyholders will have a different set of rights to other Eligible Policyholders.

70 The situation is analogous to schemes where shareholders are to exchange one set of shares for another and, because of foreign securities law, overseas-based shareholders have been unable to participate in the exchange. Instead, the overseas-based shareholders had to accept a cash equivalent. Such a difference is not enough to justify the creation of a separate class where:[28]

70.1 the intrinsic value assured to members if the scheme is approved is the same for overseas-based shareholders as for the others;

70.2 there are practical considerations underlying the differentiations that give them a rationale that would be readily understood; and

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27 Affidavit of Timothy Charles Sole at [82].

28 *Re Hills Motorway Ltd* (2002) 43 ACSR 101 at [13] (**BoA Tab 6**). Subsequently followed in *Re CSR Ltd* (2003) 45 ACSR 34; [2003] FCA 82; *Re Zinifex Ltd (No 1)* [2008] VSC 631*; Re Straits Resources Ltd* [2010] FCA 1466*; Re Queensland Professional Credit Union Ltd (No 1)* [2016] QSC 73.

70.3 where the overriding issue to be determined at the meeting is whether the proposed effect of the scheme is in the shareholders' interests.[29]

71 That is consistent with the majority's approach in *Trends Publishing*. A difference in rights does not mean that Overseas Eligible Policyholders cannot consult with other Eligible Policyholders with a view to maximising the value of their Policies.

72 Foundation Life is essentially following the same approach that is described in those two cases, as well as that mandated by the majority in *Trends Publishing*:

72.1 the reason Overseas Eligible Policyholders do not have an option to directly choose a Replacement Policy from Chubb Life is a sound one;

72.2 the intrinsic value assured to Overseas Eligible Policyholders is the same as for all other Eligible Policyholders in that:

(a) insofar as they are limited to the cash only option, Overseas Eligible Policyholders will receive an equivalent cash payment to all other Eligible Policyholders who choose the cash only option;

(b) if an Overseas Eligible Policyholder wishes to obtain a Replacement Policy instead of a cash payment, that Overseas Eligible Policyholder can transfer their Policy to a New Zealand resident in order for the new policyholder to access the insurance options from Chubb Life.

73 Accordingly, the Overseas Eligible Policyholders will still be able to consult with all other Eligible Policyholders with a view to their common interest. A separate class for Overseas Eligible Policyholders is therefore not warranted.

[29] *Re Michael Hill International Ltd* [2016] NZHC 1114 at [11] (**BoA Tab 8**).

SUMMARY

74 At this stage, Foundation Life seeks interlocutory orders about the procedure of the Part 15 application. The proposed orders fairly notify affected parties of the proposed Scheme and give them sufficient time to consider their position, take advice and decide whether to support or oppose the Scheme.

Dated: 27 February 2024

M D Arthur
Solicitor for applicant