IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV NO: 2025-485-142

In the matter of	**a scheme of arrangement under Part 15 of the Companies Act 1993**
Between	**FOUNDATION LIFE (NZ) LIMITED**, a duly incorporated company having its registered office at Ground Floor, 50 Customhouse Quay, Wellington **APPLICANT**

AMICUS REPORT TO THE COURT

Dated 17 March 2025

Counsel
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MAY IT PLEASE THE COURT:

1. I accepted appointment as an amicus following a minute issued by Justice Grice on 6 March 2025, the subsequent memoranda of counsel dated 7 and 10 March 2025, and the minute of Associate Judge Skelton dated 11 March 2025.

2. To be clear, I do not consider it my role to try to find difficulties with the application or Scheme, but rather to review what is before the court from a perspective that is independent of the applicant, Foundation Life (NZ) Ltd. This I have done.

Materials that I have reviewed

3. I have been given, and read, all of the documents filed with the court. I have paid particular attention to the structure of the without notice interlocutory application, the memorandum of counsel (and authorities referred to therein) and the proposed explanatory materials that are to go to policy holders, assuming that the interlocutory application for directions as to service and initial orders is granted.

The current application and the questions for the court

4. The "Stage 1" questions in the memorandum of counsel of 7 March 2025 approved by the court, are:

    (i) Whether there is any apparent reason why the Scheme itself is not capable of approval; and

    (ii) Whether there is any apparent reason why the proposed procedure will not:

        (a) properly inform policy holders; and

        (b) provide an appropriate meeting, especially in relation to class composition.

5. In my submission the questions can be broken down into separate topics as follows:

(i) whether it is appropriate to entertain the application on a without notice basis;

(ii) whether there are any defects in either the Scheme itself or the procedure for approving it that would mean that the Scheme, if approved by members, would not, or perhaps might not, be approved by the Court; and

(iii) whether the materials to be provided to policy holders (especially the Explanatory Statement) are in such form as would enable a policy holder to make an informed judgment as to whether to vote for or against Scheme; and

(iv) whether the other requirements of the Act will be complied with by the proposed procedure.[1]

Without notice interlocutory application?

6. I agree, for the reasons given in the applicant's memorandum of counsel,[2] that it is unrealistic and impractical to require that the current application be made on notice. There are 27,000 policy holders. It would be very difficult, in my submission, if the application were to be made on notice, especially having regard to the purely procedural nature of the orders sought, which will involve no material interference in policy holders' existing rights.[3] It would be unduly burdensome and confusing, and unreasonably expensive.

7. I submit, therefore, that it is proper for the present application to be brought without notice and I would add, in counsel's experience and knowledge of these sorts of schemes, the procedural order is routinely made on the basis of a without notice application.

Is the proposed Scheme capable of approval?

8. This involves two elements:

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[1] I take this formulation from *Re SFE Corporation Ltd* [2006] FCA 670, (2006) 59, ACSR 82 at [3] and *Re Westfield Holdings Ltd* [2004] NSWSC 458, (2004) 49 ACSR 734 at [4]. In my submission the principles in those cases apply equally in the present case.
[2] Memorandum of counsel for applicant dated 27 February 2025 at [28]-[29].
[3] There is a minor exception for the "moratorium" effect of the orders sought in [1.14] and [1.15] of the application, dealing with the relatively few policy holders whose rights may crystalise under the policies during the period between the record date and the Scheme approval date.

(i) is there jurisdiction to put and approve the Scheme; and

(ii) is the proposal of a nature that it is proper that it could be put to policy holders having regard to the overall substance of the Scheme and the way it is proposed to be explained to policy holders?

9. There is no question but that this Scheme can be put to policy holders pursuant to part 15 of the Companies Act 1993. I echo the submission made in the applicant's memorandum of counsel at [6] which adequately summarises the relevant principles. I am not aware of any rule unique to Foundation Life or its policies that would interfere with the general jurisdiction under part 15 of the Act.

10. Turning to whether the proposal is proper to put before policy holders: in my respectful submission the Scheme is one that a reasonable policy holder might approve. I submit this for the following reasons:

(i) the affidavit of Mr Sole and the Explanatory Statement explained the board's opinion that policy holders are no longer well served by their existing products. That view is supported both by the appointed actuary and by the independent actuary;

(ii) if approved, policy holders will enjoy enhanced benefits either in the form of an increase on the sum insured (5%) or on surrender value (also 5%);

(iii) policy holders will enjoy the benefits of a policy backed by an active and growing insurer with a higher security rating than Foundation Life's;

(iv) the Scheme gives policy holders flexibility and other options (including liquidity) that they would not otherwise have if the Scheme were not approved.

11. The Explanatory Statement identifies several possible disadvantages of the Scheme as well. These appear to be thoughtfully considered and fairly described in the Explanatory Statement. None of the matters referred to in the Explanatory

Statement would, in my submission, be a basis for concluding that the Scheme should not be put to policy holders to consider. They are in the nature of inevitable "pluses and minuses" that come with any change of the kind contemplated in the proposed Scheme. Overall, policy holders will need to determine, each according to his or her own interests, whether the benefits (which are material) outweigh any possible disadvantages. I see no reason why those matters should not be put to policy holders.

12. I have considered the language and content of the Explanatory Statement. It appears comprehensive and well set out. Obviously there may be queries or issues that arise during the course of the process that may indicate that some aspect needs further consideration or explanation, but having regard to the various audiences for the Explanatory Statement (which range from possibly unsophisticated policy holders in some cases to highly sophisticated ones, and financial advisers, banks, lawyers and insurance brokers) the materials appear well layered and contain the sort of information that all of those audiences would want to have at the appropriate level of detail.

13. In short then, as matters stand I submit that there is nothing in the way in which the Scheme is being explained that would stand in the way of the orders sought being granted.

Will correct procedures be complied with?

14. I have not identified any matter in the materials that would suggest that any improper procedure is being adopted. On this aspect, perhaps the most important question is whether the class analysis is correct. In this case, the applicant wishes to treat all policy holders as one class for the purposes of voting.

15. It is important to have class analysis right early in the process because if it is not, it can lead to a considerable waste of time and money – not to mention creation of avoidable confusion – if the scheme ultimately is not approved by the court on account of some defect in that respect.

16. A significant aspect to note in this case is that policy holders are not being asked to compromise rights. The more common form of scheme where class rights might differ is where (for example) different classes of creditors in a distressed company are being asked to accept discounts on the amounts they are owed by the company. In that situation there may be several different types of interests to the extent that it is inappropriate for creditors to vote in a single group. At the same time, the cases show that the courts are anxious not to create minority veto rights if that would not be fair to other persons interested in the proposal.

17. This is not our case. Policy holders will enjoy enhanced benefits, whichever option they choose from those contained in the proposed Scheme. In addition, I respectfully submit that the analysis in the applicant counsel's memorandum at [39]-[73] is correct. In short, the submission is made there that the only differences between policy holders – whether they are whole of life or endowment policy holders – is one of *value*, not legal rights. There are various other distinctions among the policy holders besides whether they hold a whole of life or endowment policy. Each of those distinctions relates to items that affect the value of the particular bundle of rights attaching to that particular policy. But in substance, for the purposes of the proposed Scheme, all policy holders are in the same position and for that reason I respectfully submit that it is proper for all policy holders to vote as a single class.

Reservations on my submission to the court

18. I note that this report to the court is made on the basis only of the materials that have been filed. It is possible that an issue could be raised by one of the policy holders while considering the proposed Scheme that gives rise to a concern that I have not anticipated or a fact or circumstance of which I was not aware. The Explanatory Statement indicates that questions arising can be dealt with either before or at the meeting. If anything arises that is of real concern, that matter can be dealt with at the time that Foundation Life returns to court to seek approval of the scheme after any vote in favour of it. Should any such issues arise, I anticipate addressing them as needed in my "Stage 2" report.

Summary

19. I answer the questions therefore as follows:

(i) Whether there is any apparent reason why the Scheme itself is not capable of approval?

Answer: No.

(ii) Whether there is any apparent reason why the proposed procedure will not properly inform policyholders or provide for an appropriate meeting, especially in relation to class composition?

Answer: No.

Dated 17 March 2025

A S Ross KC