

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

S CI 2015 02020

IN THE MATTER of an Application pursuant to Rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*

and

IN THE MATTER of an Application under s 63A of the *Trustee Act 1958 (Vic)*

W.E. PICKERING NOMINEES PTY LTD (ACN 007 817 825)
(AS TRUSTEE FOR THE W.E. PICKERING FAMILY TRUST)
& ORS (according to the Schedule)

Plaintiffs

v

JACQUELINE ROBYN PICKERING & ORS
(according to the Schedule)

Defendants

- and -

S CI 2018 02379

G.S. & B.W. PICKERING NOMINEES PTY LTD
(ACN 007 817 834) (AS TRUSTEE FOR THE GEORGE
PICKERING FAMILY TRUST) & ORS (according to the
Schedule)

Plaintiffs

v

KAYE HOLT & ORS (according to the Schedule)

Defendants

JUDGE: LYONS JA

WHERE HELD: Melbourne

DATE OF HEARING: 15 February, 17 September 2021 and, 22 February 2023 with
further submissions and draft orders including 18 April, 16
August and 24 October 2023

DATE OF JUDGMENT: 24 January 2024

CASE MAY BE CITED AS: Re The Pickering Family Trusts

MEDIUM NEUTRAL CITATION: [2024] VSC 5

TRUSTS - *Trustee Act 1958* (Vic), s 63A - Application for Court approval of arrangement to vary trust on behalf of underage and potential unborn beneficiaries - Variation sought to put in place succession plan of those who established trust - Matters which Court may consider in determining if the 'arrangement' is 'for the benefit of' underage or unborn beneficiaries - Benefit must not be illusory - Observations concerning whether, if arrangement subject to risk, a 'benefit' for the purpose of s 63A can be established for underage children or unborn beneficiaries - *George v Kollias* [2007] VSC 46 and *Re CL* [1969] 1 Ch 587 considered - Court not satisfied that original arrangement was for benefit as benefit not real and illusory - Opportunity for trustees to put forward revised arrangement 'for the benefit of' underage and potential unborn beneficiaries - Court satisfied that revised arrangement both 'for the benefit' of underage and potential unborn beneficiaries and reasonable and fair in all the circumstances - Approval given.

APPEARANCES:

For the Plaintiffs in each proceeding

Counsel

Mr D J Williams QC
with Mr B J McCullagh

Solicitors

Partners Legal

For the Defendants in each proceeding

Mr N Jones

Clancy & Triado

For the Contradictor in
S CI 2015 02020 (Ms Lyttleton and
Mr Pascoe)

Mr P Pascoe

Suzanne Lyttleton
Lawyers

For the Contradictor in
S CI 2018 02379 (Ms Lyttleton)

HIS HONOUR:

1 Introduction

- 1 These two proceedings have a long history. They relate to family trusts established by each of two brothers Edward (**Ted**) Pickering and George Stewart Pickering in mirror terms (the **Ted Pickering Family Trust** and the **George Pickering Family Trust**, and collectively the **Family Trusts**).
- 2 The plaintiff in each proceeding is the trustee of each Family Trust, which I will refer to as the **Trustee** (or **Trustees**), unless it is necessary to identify the **Ted Pickering Trustee** or **George Pickering Trustee**. Each Trustee seeks that the Court approve an arrangement in relation to the Family Trusts on behalf of underage and potential unborn beneficiaries pursuant to s 63A of the *Trustee Act 1958* (Vic) (the *Trustee Act*). Ms Suzanne Lyttleton, solicitor and Mr Peter Pascoe of counsel were appointed to represent potential unborn beneficiaries in these proceedings (collectively, the **Contradictor**). The Contradictor has also addressed issues relating to two underage beneficiaries of the Ted Pickering Family Trust and any potential adopted members of the Ted Pickering family or the George Pickering family who could become beneficiaries of either Family Trust.
- 3 The nature of the proposed arrangement has changed over time. I have previously declined to approve an ‘original proposed arrangement’¹ notwithstanding it was consented to by all adult beneficiaries of each Family Trust and by the Contradictor. At that time, and subsequently, I raised with the parties the issues to be addressed before approval was likely to be given. The Trustees have now put forward a ‘revised proposed arrangement’² which addresses those issues. The Contradictor consents to the revised proposed arrangement and to proposed orders which give effect to them. The adult beneficiaries of each Family Trust appear to have consented to the revised proposed arrangement or have otherwise given up their rights in relation to the Family Trusts.

¹ Defined below at [62(1)].

² Defined below at [72].

4 After considering all the evidence and submissions further, I have decided that it is appropriate to approve the revised proposed arrangement pursuant to s 63A of the *Trustee Act* on behalf of any unborn or other potential beneficiaries (the **potential Beneficiaries**) and the two underage beneficiaries and to make orders giving effect to it. Given that these orders are, in substance, made with the consent of the Contradictor, these reasons will be shorter than they otherwise would be, noting that substantial Court resources have already been expended in determining these proceedings.

5 However, I consider it appropriate to address the elements required in order for approval to be given on behalf of an underage or unborn beneficiary under s 63A of the *Trustee Act* (including the nature of the 'benefit' required) and why the revised proposed arrangement satisfies those requirements.

2 Section 63A of the *Trustee Act*

6 Section 63A of the *Trustee Act* gives the Court jurisdiction to approve an arrangement varying or revoking a trust on behalf of a number of different classes of persons not capable of providing consent, including relevantly for the purpose of these proceedings, underage persons pursuant to s 63A(1)(a) and unborn persons pursuant to s 63A(1)(c). Section 63A(1) provides:

63A Power of Court to vary trusts

(1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any will settlement or other disposition, the Court may if it thinks fit by order approve on behalf of –

- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting; or
- (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the Court; or
- (c) any unborn person; or

- (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined – any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees or managing or administering any of the property subject to the trusts:
Provided that except by virtue of paragraph (d) of this subsection the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

7 Before granting approval under s 63A on behalf of the relevant person, the Court must be satisfied of two things. First, that the carrying out of the arrangement ‘would be for the benefit of’ the relevant person (the **first stage** or the **proviso**). Second, once the proviso has been satisfied, the Court may approve the arrangement if, in its nature, it is a proper and fair one (the **second stage**).³ This two-stage approach was adopted by the Court of Appeal in *Perpetual Trustees Victoria Ltd v Barns (Barns)*.⁴

8 In the course of oral and written submissions, counsel for the parties referred to a number of authorities in respect of s 63A of the *Trustee Act* or its equivalents in other jurisdictions. My review of those authorities indicates that the decision of the court in each case is very much fact-based. Further, my review indicates that many of the facts in each case are relevant both to the first stage and the second stage under s 63A. As a result, often the reasons for judgment contain little or no separate consideration of each stage. Further, not all the authorities speak with one voice as to the principles to be applied at each stage. This may be due, in part, to the fact that approval of an arrangement may be given by the Court on behalf of the different classes of persons identified in s 63A(1)(a)–(c) in respect of whom the proviso also applies.

9 As a result, it is appropriate to identify some of the relevant principles to be applied and matters to be taken into account at each stage.

³ These principles are summarised by the previous decision of McMillan J in the first proceeding: *WE Pickering Nominees Pty Ltd v Pickering* [2016] VSC 71.

⁴ (2012) 34 VR 387, 395 [36] (Buchanan and Bongiorno JJA and Williams AJA) (*‘Barns’*).

2.1 The first stage

10 First, s 63A relates to ‘any arrangement ... varying or revoking all or any of the trusts, or enlarging the powers of the trustees or managing or administering any of the property subject to the trusts’. The Court of Appeal in *Barns* adopted the observations of Lord Evershed MR in *Re Steed’s Will Trusts (Steed)*⁵ that the word ‘arrangement’ was ‘deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts’ and is not limited to an arrangement which is put forward *inter partes*.⁶ In *Steed*, Lord Evershed MR continued that the court must regard the ‘proposal as a whole’ for the purpose of the proviso.⁷ With respect, I agree with those views. Further, this approach is consistent with the words of the proviso that the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person. In my view, the proviso requires the Court to consider how the arrangement or proposal will or will likely be carried out or to operate in fact.

11 Second, it is clear that a ‘benefit’ must be established for the purpose of the proviso. As to the nature of the ‘benefit’, the requirement is not limited to a financial benefit: it may include a benefit of any other kind including social, familial, moral or educational benefits.⁸

12 In my view, the concept of ‘benefit’ for the purpose of the proviso must be considered in the context of the particular trust to which the proposed arrangement relates. Thus, in the context of an object of a discretionary trust, any ‘benefit’ said to arise from the proposed arrangement must be considered in light of the present rights of such an object.

⁵ [1960] 1 Ch 407, 419 (Evershed MR, Willmer and Upjohn LLJ agreeing) (*Steed*).

⁶ *Barns* (n 4) 392–3 [25].

⁷ *Steed* (n 5) 421 (Evershed MR, Willmer and Upjohn LLJ agreeing).

⁸ See, eg, *Re Weston’s Settlements* [1969] 1 Ch 223, 245 (Lord Denning MR) and *Re Remnant’s Settlement Trusts* [1970] Ch 560, 566 (Pennycuick J).

13 Where the arrangement may involve a risk from the point of view of infants or unborn children, the following question has been posed: 'is the risk one that an adult would be prepared to take?'. Relevantly, this question was addressed by Hansen J in *George v Kollias*:

It may be that an arrangement involves a risk from the point of view of infants and unborn persons. That is not necessarily decisive against approval. The arrangement and its benefits and disadvantages must be considered overall. So considering the matter it may be concluded that the risk to infants and unborn persons 'is a risk that an adult would be prepared to take' and which the Court is prepared to take on behalf of those persons.⁹

14 In doing so, Hansen J relied upon the judgment of Danckwerts J in *Re Cohen's Will Trusts; Re Cohen's Settlement Trusts (Re Cohen's Will Trusts)*.¹⁰ I note that the judgment of Danckwerts J in that case merely posed that question, on behalf of infant children and answered it, and no more.¹¹ However, I am conscious that other judges have asked and answered this or similar questions in relation to the proviso.¹²

15 Similar questions were posed by the Trustees in these proceedings in relation to the original proposed amendments, namely 'would an adult well-advised be willing to agree to this or would they agree to it? And if it involves the taking of a risk, would they will be willing to take that risk?'.¹³ The Contradictor also posed and answered a similar question in these proceedings in relation to the original proposed amendments, submitting that the Court may consent if an unborn beneficiary 'was born and was *suis juris* and capable of managing his or her affairs, [where] it is almost certain that his/her legal advisers would advise him/her to consent to the arrangement', relying upon *Re CL*.¹⁴ I will comment on *Re CL* further below.

16 I consider that, where the arrangement or the carrying into effect of the arrangement involves such risk that any purported benefit is theoretical or illusory, it is not a

⁹ [2007] VSC 46, [44] (Hansen J) (*George v Kollias*'). See the application of this principle at [70].

¹⁰ [1959] 1 WLR 865, 868 (Danckwerts J) (*Re Cohen's Will Trusts*').

¹¹ Ibid. The version of the decision reported at [1959] 3 ALL ER 523 does little more.

¹² See, eg, *Re Van Gruisen's Will Trusts* [1964] 1 WLR 449 referred to in JD Heydon and MJ Lemming, *Jacobs' Law of Trusts in Australia* (Lexis Nexis Butterworths Australia, 8th ed, 2016) [17-07].

¹³ Transcript of Proceedings, *Re The Pickering Family Trusts* (Supreme Court of Victoria, S CI 2015 02020; S CI 2018 02379, Lyons J, 15 February 2021) 12.25–29 (D.J. Williams KC).

¹⁴ *Re CL* [1969] 1 Ch 587.

'benefit' for the purpose of the proviso. Further, in those circumstances, the answer to the question posed in *George v Kollias* is likely to be 'no'.

17 In addition, for my part and with respect, I have some reservations about the appropriateness of the question posed in *George v Kollias* for the purpose of satisfying the proviso and in particular the requirement of a 'benefit'.

18 As noted above, the Contradictor relied upon the decision of Cross J in *Re CL*, including to support the proposition that the Court may approve an arrangement to vary a trust deed where the variation is not for the financial benefit of the relevant person. I pause to note that the facts in *Re CL* were very different to this case. *Re CL* concerned an arrangement for the variation of a protected life interest of a 78-year-old widow and mother (the **mother**) in a trust fund established by her husband. The mother was affected by a mental disability and had more than adequate income for her maintenance and support from trust income. The purpose of the variation was, in effect, to advance part of the mother's income under the protected life interest to her adopted daughters before her death. The Court approved the arrangement in those circumstances.

19 Relevantly, Cross J first considered the issue from the perspective of the mother being the relevant person. The relevant test in those circumstances was that 'it was, in a broad sense of the word, for the benefit of the patient to have done for him what he would in all probability have done himself if he had been of sound mind.'¹⁵ Cross J had no difficulty in concluding that the arrangement was for the benefit of the mother in the sense that she would have agreed to it.¹⁶ This was in a context where the arrangement was for the benefit of the mother's adopted daughters, it was to result in estate duty savings and involved a 'trifling' reduction to the mother's income.¹⁷

¹⁵ Ibid 596 (Cross J).

¹⁶ Ibid 597-8.

¹⁷ Ibid 593.

20 Cross J then concluded that (1) the word 'benefit' in the context of the English law equivalent of s 63A should have the same meaning as it had in the context of advancement and (2) it was not necessary that there must always be some element of financial advantage for the purpose of the proviso.¹⁸ With respect, I agree with the latter conclusion and am of the view that this principle is of general application to all classes of relevant persons under s 63A(1)(a)-(c) of the *Trustee Act*. As to Cross J's former conclusion, I agree that in cases akin to advancement by a parent under a disability of their children's interests, a non-financial (or moral) benefit may be established for the purpose of satisfying the proviso.

21 However, in my view, and without the benefit of detailed argument on this point, the question posed in *Re CL* – namely, would the person, if they were well-advised and capable of managing their affairs have consented to the arrangement? – is of limited application beyond its particular circumstances, particularly to the case of underage or unborn children. In part, this is because it is difficult to identify with any certainty the relevant circumstances or characteristics of such an underage child (in particular an infant) or unborn child, which would inform an answer to be given to this question on their behalf. By way of illustration, in the case of an unborn child, such a child may be born with a disability which directly affects their needs and ability to support him or herself as an adult, which would necessarily inform whether they would be advised to consent or would consent to any proposed arrangement.

22 I note that my general view about the application of *Re CL* accords with the learned authors of *Lewin on Trusts*, who suggest that it is 'not clear' whether the question in *Re CL* of 'what the patient would have done' can be extended to cases not involving an adult beneficiary lacking mental capacity, for example, to cases involving young children or unborn beneficiaries.¹⁹

¹⁸ Ibid 597–600.

¹⁹ Lynton Tucker, Nicholas Le Poidevin, James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th ed, 2020) [53-068].

23 Despite my reservations about the appropriateness of the questions posed in *George v Kollias* and *Re CL* (at least in the case of young children or unborn beneficiaries) it is unnecessary for me to form any concluded view in this regard in light of the revised proposed arrangement. However, further consideration may need to be given to these issues should the appropriate occasion arise in light of the words used in s 63A of the *Trustee Act*.

24 Third, as to non-financial benefits, the Trustees relied upon a familial benefit, namely the promotion of family harmony and the deterrence of prospective inter and intra family jealousies. However, the nature of familial benefits sufficient to satisfy the proviso has been the subject of judicial consideration and, in my view, is more limited than the parties before me submitted. In *Re Christmas' Settlement Trusts*, McPherson J concluded that, in his view, 'the mere hope of avoiding possible future family friction ... at least in the case of relatives as remote as cousins living apart' would not ordinarily constitute a benefit for the purposes of the proviso.²⁰ With respect, I agree with these comments of McPherson J which were also adopted by Hansen J in *George v Kollias*.²¹ Nevertheless, Hansen J acknowledged that the possibility of a family dissension may be an appropriate consideration in the circumstances of a particular case.²² In this regard, Hansen J referred to *Nicholas v Equity Trustees and Executors Agency Co Ltd*,²³ where substantial litigation between family members was already afoot, which was to be resolved by approval of the proposed variations in that case. With respect, I also agree with these further comments of Hansen J.

2.2 The second stage

25 The second stage requirement — that the arrangement is a proper and fair one — involves a consideration of the arrangement as a whole. Courts should engage in a 'businesslike consideration of the arrangement, including the total amounts of the

²⁰ *Re Christmas' Settlement Trusts* [1986] 1 Qd R 372, 377 (McPherson J).

²¹ *George v Kollias* (n 9) [45] (Hansen J).

²² *Ibid.*

²³ Unreported, Supreme Court of Victoria, Harper J, 27 March 1996.

advantages which the various parties obtain, and their bargaining strength.²⁴ Courts may take into account the purpose of the trust and the intention of the settlor,²⁵ and the attitude of other beneficiaries or interested persons.²⁶

3. The relevant facts

3.1 The Pickering families and the Family Trusts

26 Ted Pickering and George Pickering were brothers. Together they established and conducted the Pickering Transport Group (the **Group**) from the 1950s. The Group has been very successful. Each of Ted and George established a family trust by deed of trust dated 1 February 1977 in mirror terms (i.e. the Ted Pickering Family Trust and the George Pickering Family Trust). I will deal with the relevant clauses of these trust deeds in due course.

27 As to the Ted Pickering family, Ted married Dorothy in 1956. Together they had five children:

- (1) Dawn born in 1958 who has one adult child, Natasha;
- (2) Roger born in 1959 who has two adult children, Justin and Rebecca;
- (3) Peter born in 1960 who has two adult children, Emma and Lachlan;
- (4) Robyn born in 1961 who has three adult children, Christopher, Teghan and Lana; and
- (5) Daryl born in 1969 who has three adult children, Benjamin, Mykaela and Mathew.

28 Dorothy died in September 1973. Ted then married Jacqueline in about 1975. Together they had a daughter, Cindy, born in 1975 who has two children under 18:

²⁴ *Barns* (n 4) [36] (Buchanan and Bongiorno JJA and Williams AJA), quoting *Re Van Gruisen's Will Trusts* [1964] 1 WLR 449, 450 (Ungoed-Thomas J).

²⁵ *Ibid.*

²⁶ *Ibid* [40]. It is also observed that the attitude of the Attorney-General is considered 'significant' in respect of proposed variations to a charitable trust.

Nicholas born in April 2009 (now aged about 14) and Mitchell born in March 2012 (now aged about 11) (the **underage Beneficiaries**).

29 As to the George Pickering family, George married Betty in 1961. Together they had three adopted children:

- (1) Kaye born in 1962 who has four adult children, Melissa, Timothy Michael and Kirsty;
- (2) Joanne born in 1966 who has two adult children, Sammyle and Tailah; and
- (3) James (who goes by Jamie) born in 1967 who has two adult children, Bradley and Mark.

30 Betty died in May 1977. George then married Lynette in or about 1990.

31 Ted and George died in 2012 and 2020, respectively.

32 The substantive terms of each Family Trust deed, save for the recitals and the beneficiaries, are the same. In summary, each of the Family Trust deeds contains a defined class of beneficiaries, namely the relevant brother and his spouse, the current and future children of the relevant brother and his spouse, and the current and future grandchildren of the relevant brother and his spouse. There is no power of amendment. For convenience, I will refer to the beneficiaries under each Family Trust as the **Beneficiaries**.

33 The recitals to the Ted Pickering Family Trust record that the settlor, George, was desirous of creating a trust in favour of Ted and his wife Jacqueline. As a result, cl 2 provides, in substance, that the Beneficiaries of the Ted Pickering Family Trust shall comprise the class consisting of:

- (a) William Edward [Ted] Pickering
- (b) Jacqueline Robyn Pickering
- (c) Roger Stuart Pickering
- (d) Dawn Margaret Pickering
- (e) Robyn Elizabeth Pickering
- (f) Peter Edward Pickering
- (g) Daryl John Pickering

(h) Cindy Lynne Pickering

and any further child or children hereafter born of the said William Edward Pickering and Jacqueline Robyn Pickering and for any of the grandchildren of the said William Edward Pickering and Jacqueline Robyn Pickering being the issue of any of the children of the said William Edward Pickering and Jacqueline Robyn Pickering (all of whom are hereinafter called 'the beneficiaries') ...

34 The recitals to the George Pickering Family Trust record that the settlor, Ted, was desirous of creating a trust in favour of George and his wife Betty. As a result, cl 2 provides, in substance, that the Beneficiaries of the George Pickering Family Trust shall comprise the class consisting of:

- (a) George Stewart Pickering
- (b) Betty Wilma Pickering
- (c) Kaye Lorraine Pickering
- (d) Joanne Lynne Pickering
- (e) James Stewart Pickering

and any further child or children hereafter born of the said George Stewart Pickering and Betty Wilma Pickering and for any of the grandchildren of the said George Stewart Pickering and Betty Wilma Pickering being the issue of any of the children of the said George Stewart Pickering and Betty Wilma Pickering (all of whom are hereinafter called 'the beneficiaries') ...

35 As is evident, Ted and George had no children other than those named in cl 2 of each Family Trust deed. Further, the children of Ted and George now have families of their own. For convenience, I will refer to the children of Ted and George as the **named Beneficiaries** or the **named parents**. Save for perhaps Cindy, the female children of Ted and George are no longer capable of conceiving children naturally. Several of the named Beneficiaries have deposed in these proceedings that they do not intend to have or adopt any more children. However, intentions can change.

36 Several other terms in each Family Trust deed are relevant to these proceedings. First, cl 2 provides that until the 'distribution date', the Trustee shall prior to 30 June each year allocate and prior to the settlor's death pay the whole of any net annual income as it shall determine in its absolute discretion to one or more of the Beneficiaries of the Family Trust (to the total or partial exclusion of any one or more of the Beneficiaries in such shares and proportions as the Trustee shall determine) and any income not so distributed shall form part of the corpus of the Family Trust.

37 Under cl 2 of each Family Trust deed, the 'distribution date' is expressed to be the later of the 21st anniversary of the death of:

- (1) the last survivor of the descendants of Queen Elizabeth II living at the time that the Family Trust was established; or
- (2) the last to die of the Beneficiaries living at the time that the Family Trust was established.

38 I have taken judicial notice that Prince Edward was born in 1964 and that there were no other descendants of Queen Elizabeth II born prior to the establishment of the Family Trusts. Given that Cindy was born in 1975, it appears that the distribution date will likely be in several decades.

39 Second, cl 3 of each Family Trust deed provides that:

- (1) at the distribution date, the Trustee shall hold the corpus of the respective Family Trust to distribute between one or more of the Beneficiaries as shall then be alive (in such shares to the total or partial exclusion of any one or more of the Beneficiaries as the Trustee shall determine); and
- (2) prior to the distribution date, the Trustee is empowered in its absolute discretion at any time to distribute and pay to any Beneficiary the whole or any part of the corpus of the respective Family Trust either absolutely or subject to such terms as the Trustee shall think fit (the **cl 3 power**).

40 Third, cl 7 of each Family Trust deed permits the Trustee to pay a share of the corpus to, or for the benefit of, any Beneficiary who is under the age of 18 for the 'maintenance education benefit or advancement in life' of that Beneficiary (the **cl 7 power**).

41 Fourth, cl 10 of each Family Trust deed provides that the Trustee may, after the settlor's death, in its discretion revoke that Family Trust as to the whole or any part of the corpus and to resettle the same upon a new trust for the benefit of any one or

more of the Beneficiaries to the total exclusion of all other Beneficiaries (the **cl 10 power**).

3.2 The succession plan and the original proposed arrangement

42 The Ted Pickering Trustee commenced its proceeding in 2015 seeking the substance of original proposed amendments (the **first proceeding**). The defendants to the first proceeding are Ted's children and grandchildren. Cindy has been appointed the litigation guardian of her two children who are under 18 (i.e. the underage Beneficiaries).

43 The George Pickering Trustee commenced its proceeding in 2017 (the **second proceeding**). The defendants to the second proceeding are George's children and grandchildren, all of whom are 18 or older.

44 The Trustee of each Family Trust sought that the Court approve variations to each Family Trust deed to give effect to Ted and George's succession plans including for the Group (the **succession plan**). Under the succession plan:

- (1) two of Ted's children, Roger and Daryl, and one of George's children, Jamie, (collectively, the **Group Managers**) are to take the assets of each of Ted and George in the Group (the **Group assets**) in equal shares; and
- (2) Ted's remaining children Dawn, Peter, Robyn and Cindy, and George's remaining children, Joanne and Kaye (collectively, **Non-Group Managers**) are to share the **non-Group assets**.

45 On the evidence before me, the substantial remaining assets of the Family Trusts are the Group assets and there is good reason for the succession plan given that the Group Managers have worked for the Group for a long time and are now senior executives of the Group.

46 The succession plan was reflected in distributions made to Non-Group Managers while Ted and George were alive. It is also reflected in the wills of each of Ted and

George. Relevantly, each of Ted and George expressed the desire in his will that there be a capital distribution of:

- (1) Group assets owned by each of the Family Trusts to the respective trustees of the Group Managers' family trusts; and
- (2) non-Group assets owned by each of the Family Trusts to the non-Group Managers.

47 It is not possible for the Trustee of each Family Trust to distribute the Group assets owned by each Family Trust equally to the Group Managers. This is because Ted's sons, Roger and Daryl, are not Beneficiaries of the George Pickering Family Trust and George's son, Jamie, is not a Beneficiary of the Ted Pickering Family Trust.

48 It is possible to make in specie distributions to the Group Manager Beneficiaries under each Family Trust with a further distribution of those assets between the Group Managers. However, on the evidence before me, which I accept, that course:

- (1) would attract significant capital gains tax, stamp duty, and legal and professional expenses which would significantly impact upon the viability of the business of the Group; and
- (2) would result in the need to renegotiate the terms and conditions of various loans and to re-document existing mortgages and/or replace existing securities and that the willingness of the Group's financiers to do this cannot be safely assumed.

49 In each of these proceedings, in about 2018, the Trustee of each Family Trust sought orders to expand the defined class of beneficiaries under each Family Trust deed to include the family members of the other Family Trust (including related companies and trusts) (the **original proposed amendments**). The original proposed amendments were put forward in order to give effect to the succession plan.

50 The adult Beneficiaries of each Family Trust agreed to the original proposed amendments. Indeed, on the evidence before me, it would appear that all the adult Beneficiaries have had their interest in the relevant Family Trust 'extinguished'. Further, the two underage Beneficiaries of the Ted Pickering Family Trust, by their mother and litigation guardian Cindy (Ted's daughter), also agreed and desired that the Court approve the original proposed amendments.

51 As noted above, a Contradictor was appointed in these proceedings to represent the class of potential unborn beneficiaries of each Family Trust. The Contradictor did not oppose the Court approving the original proposed amendments on behalf of the unborn beneficiaries of each Family Trust. In summary, this was because the Contradictor submitted that the proviso was satisfied. This was in circumstances where the original proposed amendments made the Beneficiaries of each Family Trust Beneficiaries of the other and there was a potential financial benefit to each unborn Beneficiary.

52 In doing so, the Contradictor submitted that it was permissible but not necessary for the Court to have regard to the succession plan in deciding if the proviso had been satisfied. The Trustees agreed with these submissions. The Trustees further submitted that the relevant benefit for the proviso included non-financial benefits such as family harmony, which had also been established in this case.

3.3 The material relating to the original proposed arrangement

53 Before addressing why I declined to approve the original proposed amendments in September 2021, it is appropriate to refer to the voluminous material that had been filed at that time.

54 In the first proceeding, the Ted Pickering Trustee and the defendants relied upon a number of affidavits. First, they relied upon the affidavits of the wife and children of Ted, namely:

- (1) Jacqueline (Ted's second wife) sworn 22 December 2014 and 20 August 2018;
- (2) Dawn sworn 29 January 2015 and 20 August 2018;

- (3) Roger sworn 30 January and 17 September 2015, and 20 August 2018;
- (4) Peter sworn 30 January 2015 and 22 August 2018;
- (5) Robyn sworn 30 January 2015 and 20 August 2018;
- (6) Daryl sworn 29 January and 2 September 2015, 11 July 2017, 24 September 2018, 19 October 2020; and
- (7) Cindy sworn 22 December 2014 and 4 December 2015, 21 July 2017, and 20 August 2018.

55 Second, the Ted Pickering Trustee and the defendants relied upon the affidavits of:

- (1) Jamie sworn 30 January 2015, 30 September 2015 and 20 August 2018;
- (2) Lynette (George's wife) affirmed 31 October 2017; and
- (3) six affidavits of Rick Pickering, the Group's Accountant, sworn 30 January 2015, and affirmed 17 July, 25 October and 1 November 2017, 24 June 2020 and sworn 29 March 2021.

56 Third, the Ted Pickering Trustee and the defendants relied upon the affidavits of the adult grandchildren of Ted, each of whom consented to the orders sought, namely:

- (1) the child of Dawn, Natasha Grave, sworn 6 February 2015 and 22 August 2018;
- (2) the children of Roger:
 - (a) Justin Pickering sworn 29 January 2015 and 20 August 2018;
 - (b) Rebecca Pickering sworn 30 January 2015 and 20 August 2018;
- (3) the children of Peter:
 - (a) Emma Pickering sworn 30 January 2015 and 22 August 2018;
 - (b) Lachlan Pickering sworn 30 January 2015 and 22 August 2018;

- (4) the children of Robyn:
 - (a) Christopher Hosking sworn 5 March 2015 and 20 August 2018;
 - (b) Teghan Pearse sworn 25 February 2015 and 21 August 2018;
 - (c) Lana Jackson sworn 30 January 2015 and 6 September 2018;
- (5) the children of Daryl:
 - (a) Benjamin Pickering sworn 5 February 2015 and 21 August 2018;
 - (b) Mykaela Pickering sworn 24 September 2018;²⁷ and
 - (c) Mathew Pickering sworn 5 February 2015 and 22 August 2018.

57 Further, as noted above, Cindy was appointed the litigation guardian of her two children who have not yet reached the age of 18. She consented to the orders on their behalf.

58 The Contradictor relied upon the affidavit of Suzanne Lyttleton, solicitor, sworn 1 November 2017.

59 In the second proceeding, the George Pickering Trustee and the defendants relied upon a number of affidavits. First, they relied upon the affidavits of the children of George, namely:

- (1) Kaye sworn 26 June 2020;
- (2) Joanne sworn 2 July 2020; and
- (3) Jamie sworn 24 June 2020.

60 Second, the George Pickering Trustee and the defendants relied upon the affidavit of Mr Pasqualino Mittiga, former accountant of the George Pickering Family Trust, sworn 20 August 2018.

²⁷ That affidavit refers to another affidavit sworn 13 April 2018 which was not in the Court Book or filed with the Court.

61 Third, the George Pickering Trustee and the defendants relied upon the affidavits of the adult grandchildren of George, each of whom consented to the orders sought, namely:

- (1) the children of Kaye:
 - (a) Melissa Bowden sworn 2 July 2020;
 - (b) Timothy Holt sworn 26 June 2020;
 - (c) Michael Holt sworn 1 July 2020;
 - (d) Kirsty Holt sworn 3 July 2020;
- (2) the children of Joanne:
 - (a) Sammyl Pickering sworn 2 July 2020;
 - (b) Tailah Pickering sworn 2 July 2020;
- (3) the children of Jamie:
 - (a) Bradley Pickering sworn 3 July 2020; and
 - (b) Mark Pickering sworn 24 June 2020.

3.4 The original proposed arrangement was not approved

62 After considering all the evidence referred to in the previous section together with the oral and written submissions, I listed the matter for a further hearing on 17 September 2021. At that time, I informed the parties that, notwithstanding the submissions of the Trustees and the position adopted by the Contradictor, on the material before the Court, I would not grant the original proposed amendments. This was because I formed the view, based on the analysis referred to above, that:

- (1) the proposed 'arrangement' to be considered for the purpose of s 63A of the *Trustee Act* was the original proposed amendments in the context of the succession plan (the **original proposed arrangement**); and

- (2) I was not satisfied that the original proposed arrangement would be 'for the benefit' of the relevant persons for the purpose of the proviso in s 63A of the *Trustee Act*.

63 This was because, on the evidence at that time, I was satisfied:

- (1) in addition to the underage Beneficiaries, there was a real prospect of unborn beneficiaries, being future natural children of Peter (born in 1960 and Cindy born in 1975) and a more remote prospect of other future beneficiaries, being an adopted child or children of the named Beneficiaries (i.e. potential Beneficiaries);
- (2) the sole purpose of the original proposed amendments was to give effect to the succession plan immediately;
- (3) it was the intention of the Trustee of each Family Trust only to distribute the remaining assets in the Family Trusts, being the Group assets, to the Group Managers for their respective family trusts in accordance with the succession plan;
- (4) as a result, any benefit of making the Beneficiaries of one Family Trust the Beneficiaries of the other Family Trust, in so far as those Beneficiaries are the future children of Non-Group Managers, would be illusory and not real; and
- (5) consequently, based on the analysis referred to above, the original proposed arrangement was not 'for the benefit' of either or both of the underage Beneficiaries and the potential Beneficiaries, notwithstanding that all adult Beneficiaries had consented to the original proposed amendments.

64 As is evident, my concern was whether the original proposed arrangement was for the benefit of the underage children or potential children of the Non-Group Managers, given that it was only the Group Managers and any of their children who would benefit from the distribution of the Group assets of the Family Trusts under

the succession plan to be implemented. In this context, the two Non-Group Managers that I considered capable of having children were Peter and Cindy.

65 Further, I informed the parties that I did not accept the submissions of the Trustees that, if the original proposed arrangement was refused, there was a risk of family disharmony or that the avoidance of such a risk was a benefit for the purpose of the proviso in s 63A of the *Trustee Act*. This was based upon the principles set out in [23] above.

66 I informed the parties of these views in order to give the Trustees the opportunity to put forward further material in support of the application under s 63A of the *Trustee Act*, should they choose to do so. This was for two reasons. The first was because of the practical benefits of the original proposed amendments in light of the succession plan, namely significant tax and other savings and avoiding any risk to the commercial viability of the business of the Group. The second was because all the adult Beneficiaries, the litigation guardian of the underage Beneficiaries and the Contradictor were in favour of the Court approving the original proposed amendments.

67 I wish to point out that I formed the view that the original proposed arrangement satisfied the second stage under s 63A, namely that it was a proper and fair arrangement. This was in light of obvious business and commercial advantages of the original proposed arrangement, particularly in light of the settlors' succession plan and the attitudes of the adult Beneficiaries.

4. The revised proposed arrangement

4.1 Nature of the revised proposed arrangement

68 After considering their position, the Trustees filed further affidavit material and submissions, and put forward various proposed arrangements seeking to address these issues. In an attempt to limit the costs of further hearings in these proceedings, I raised further issues about these various proposals in correspondence.

69 The further affidavits were of:

- (1) Roger sworn 30 November 2021;
- (2) Peter sworn 27 October 2021;
- (3) Cindy sworn 5 November 2021;
- (4) Kaye sworn 4 November 2021;
- (5) Joanne sworn 5 November 2021;
- (6) Jamie sworn 30 November 2021;
- (7) Daryl sworn 29 November 2021 and 11 August 2022; and
- (8) two affidavits of Timoci Lido, the solicitor for the Trustees, each sworn 9 February 2023 (one affidavit was filed in each of the first and second proceeding).

70 By affidavit sworn 29 November 2021, Daryl deposed, in substance, that:

- (1) it was not the intention of the directors of the Trustees to transfer the capital assets from the Family Trusts immediately or even within the short to medium term. Rather, their intention was to put to use the assets of the Family Trusts in the operation of the business of Group and not to distribute any such assets so long as they continue to be used for the operation of the business;
- (2) it was the intention of the directors of the Trustees to keep the Family Trusts on foot indefinitely, or at least until the Trustees are required by law to vest each respective Family Trust; and
- (3) the directors of the Trustees understand their legal obligation, in exercising any discretion for capital or income distribution, to consider all Beneficiaries, including the underage Beneficiaries or potential Beneficiaries (when born or adopted). If there was a Beneficiary with needs that the Trustees believed that the relevant Family Trust could and should assist with, the directors of the

Trustee would give proper consideration to doing so, notwithstanding the substantial weight to be accorded to the succession plan.²⁸

71 By this time, the Group Managers were the directors of the Trustee of each Family Trust.

72 The Trustees have now put forward a **revised proposed arrangement**, which consists of:

- (1) the **revised proposed amendments**; and
- (2) a series of undertakings, given by the Trustees and their directors (the **revised undertakings**).

73 Both features of the revised proposed arrangement are proposed in the context of the succession plan.

74 As to the revised proposed amendments, their effect is that the defined class of beneficiaries under each Family Trust deed would be expanded to include a child or grandchild of the settlor's brother (i.e. family members that are Beneficiaries of the other Family Trust) together with the family trusts of each of the Group Managers (in order to give effect to the succession plan).

75 The revised proposed amendments, in so far as they relate to cl 2 of the Ted Pickering Family Trust deed, comprise the insertion after '(h) Cindy Lynne Pickering' and before 'any further child or children ...' of the following:

- (i) any first cousins of Daryl John Pickering and Roger Stuart Pickering, being the children of George Stewart Pickering, together with the spouses and children of any such first cousins;
- (j) the Trustee, whether original or substituted, of the D & J Pickering Family Trust;
- (k) the Trustee, whether original or substituted, of the R & J Pickering Family Trust;

²⁸ Affidavit of Daryl Pickering sworn 29 November 2021, [6], [16(a)-(c)].

- (l) the Trustee, whether original or substituted, of the James Pickering Family Trust.

76 The revised proposed amendments, in so far as they relate to cl 2 of the George Pickering Family Trust deed, comprise the insertion after '(e) James Stewart Pickering' and before 'any further child or children ...' of the following:

- (f) any first cousins of James Stewart Pickering being the children of William Edward Pickering, together with the spouses and children of any such first cousins;
- (g) the Trustee, whether original or substituted, of the D & J Pickering Family Trust;
- (h) the Trustee, whether original or substituted, of the R & J Pickering Family Trust;
- (i) the Trustee, whether original or substituted, of the James Pickering Family Trust.

77 For the most part, the revised undertakings relate to, and seek to provide a benefit for, the underage Beneficiaries and potential Beneficiaries of the Family Trusts. However, the revised undertakings define a particular sub-class of such Beneficiaries, referred to in the revised undertakings as '**Relevant Beneficiaries**', namely:

- (1) minors, being the children who have not attained the age of 18 years at the date the order of the Court is made, of the children of Ted and George in cl 2 of each of the Ted Pickering Family Trust and the George Pickering Family Trust (i.e. a named parent); and
- (2) any child or children of a named parent born or adopted within 18 years from the date the order of the Court is made.

78 I will refer to the benefits accruing to this particular class of Beneficiaries in due course. I pause to note that, as time goes by, it seems less likely that a named parent will naturally have or adopt another child or children.

79 As noted above, there are two revised undertakings: undertakings given by the Trustees (the **revised trustee undertakings**) and undertakings given by the current directors of the Trustees (the **revised director undertakings**).

80 The revised trustee undertakings may be summarised as follows:

- (1) first, prior to 30 June of each financial year during the continuation of each Family Trust, notwithstanding the succession plan, each Trustee shall give due consideration to the Relevant Beneficiaries as potential objects for the purpose of its power pursuant to cl 2 of each Family Trust deed to distribute all or any part of the annual net income of the respective Family Trust;
- (2) second, subject to (3) below, each Trustee shall not, before the expiration of a period of 18 years from the date the order of the Court is made, or the date on which the youngest then living Relevant Beneficiary attains the age of 18 years (whichever occurs later) (**Relevant Period**) exercise its corpus distribution power (under cl 3 of each Family Trust deed) to distribute to any Beneficiary the whole or any part of the corpus of each Family Trust, unless it first obtains the consent of the Court;
- (3) third, during the Relevant Period, each Trustee may exercise its corpus distribution power in favour of a Relevant Beneficiary and, pursuant to clause 7 of each Family Trust deed, pay such part of the corpus so distributed in or towards the maintenance, education, benefit or advancement in life of such Relevant Beneficiary;
- (4) fourth, each Trustee shall not, before the expiration of the Relevant Period, exercise its revocation and resettlement power (i.e. the cl 10 power) unless it first obtains the consent of the Court;
- (5) fifth, in making such distributions after the Relevant Period, each Trustee shall give due consideration to all Beneficiaries, and in particular, shall not

regard the succession plan as mitigating against such distribution after the Relevant Period to:

- (a) adult Beneficiaries not favoured by the succession plan who have not waived his or her rights and who may, in future, have needs which the Trustees could, and should, assist with; and
- (b) any Beneficiaries who are presently minors and those who may be born or adopted in the future, including the Relevant Beneficiaries.

81 Finally, in order to support the revised trustee undertakings, the current directors of each Trustee propose to give the revised director undertakings, which may be summarised as follows:

- (1) each director will comply with the revised trustee undertakings and will ensure that the giving of the revised director undertakings is recorded in the minutes of each Family Trust;
- (2) each director will use their best endeavours to ensure that any incoming directors of either Trustee, and any substituted Trustee of each Family Trust taking office during the Relevant Period, will be informed of the revised trustee undertakings and agrees to ensure that the affairs of each Family Trust will continue to be conducted in accordance with the revised trustee undertakings.

82 Thus, in summary, the effect of the revised proposed arrangement is that:

- (1) the Beneficiaries of one Family Trust will become Beneficiaries of the other, in circumstances where the directors of the Trustees have deposed to their intentions to keep the Family Trusts afoot indefinitely, or at least until each respective Family Trust is required to vest;
- (2) children born to, or adopted by, the named Beneficiaries during or after the Relevant Period (while each Family Trust is still on foot) will become a Beneficiary of each Family Trust;

- (3) all such children will be treated as potential objects of the Family Trusts before and after the Relevant Period;
- (4) during the Relevant Period, each Trustee:
 - (a) shall give due consideration to any Relevant Beneficiaries as a potential object for the purpose of its power to pay trust income distributions;
 - (b) shall not, without leave of the Court, distribute the corpus of the Family Trust except towards the maintenance, education or, benefit or advancement in life to any Relevant Beneficiary; and
- (5) after the Relevant Period, in exercising any discretion for capital or income distributions each Trustee shall consider all Beneficiaries of each Family Trust including the Relevant Beneficiaries and the potential Beneficiaries born to or adopted by a named Beneficiary after the Relevant Period (other than those whose rights have otherwise been extinguished), notwithstanding the substantial weight likely to be accorded to the succession plan.

4.2 Submissions

83 Counsel for the Trustees submitted that the revised proposed arrangement was for the benefit of the underage Beneficiaries and any potential Beneficiary in a number of ways.

84 First, the underage Beneficiaries of one Family Trust would become Beneficiaries of the other Family Trust. So too, any unborn or future adopted child, who would become a Beneficiary of one Family Trust, would also become a Beneficiary of the other Family Trust. By making underage Beneficiaries and potential Beneficiaries of one Family Trust Beneficiaries of both, the revised proposed arrangement would have the effect of increasing the assets from which income or capital distributions might be made to them. It was submitted that this is clearly a benefit to, and for, the underage Beneficiaries and any potential Beneficiaries.

85 Second, the revised undertakings (in particular, not to exercise the cl 3 and cl 10 power) ensure that, at least during the Relevant Period, the corpus of each Family Trust will be preserved, subject only to an exercise of the cl 7 power to distribute capital in favour of one of the Relevant Beneficiaries during the Relevant Period. As a result, there is a greater prospect that there will be assets from which a distribution could be made, including to underage Beneficiaries and potential Beneficiaries, at the conclusion of the Relevant Period.

86 Third, even if a potential Beneficiary was born or adopted after the end of the Relevant Period, it is more likely that the corpus of each Family Trust will not be dissipated by the time of any potential Beneficiary's birth or adoption. It was submitted, by way of illustration, that to the extent that a Trustee was inclined to exercise the cl 7 power after the Relevant Period in favour of such a potential Beneficiary, there is a greater prospect that there will be remaining assets from which a distribution could be made.

87 As noted above, the Contradictor supported the revised proposed arrangement.

4.3 Consideration of the revised proposed arrangement

88 I am satisfied that the Court should approve the revised proposed arrangement on behalf of the underage Beneficiaries and potential Beneficiaries. This is because I am satisfied that the revised proposed arrangement:

- (1) satisfies the proviso as it is for the benefit of underage Beneficiaries and potential Beneficiaries; and
- (2) satisfies the second stage as it is in its nature a proper and fair arrangement.

The first stage

89 At the outset, it is important to bear in mind that these Family Trusts are discretionary and not fixed trusts. As a result, any Beneficiary only has an entitlement to be considered as an object of the relevant Family Trust when distributions are made. The 'benefit' to any underage Beneficiary or potential Beneficiary must be considered in this light.

90 I agree with the submissions of the Trustees that by making the underage Beneficiaries and potential Beneficiaries of one Family Trust Beneficiaries of both Family Trusts, the revised proposed arrangement would have the effect of increasing the asset pool from which income or capital distributions might be made to them by the Trustee. This is a benefit for underage Beneficiaries and potential Beneficiaries (including Relevant Beneficiaries).

91 It is also important to note that pursuant to the terms of the deed of each Family Trust, each Trustee may, at any time:

- (1) exercise its power to distribute the whole or any part of the corpus of each Family Trust (i.e. the cl 3 power); and
- (2) exercise its revocation and resettlement power (i.e. the cl 10 power).

Either of which may have the effect of diminishing the assets of the relevant Family Trust or causing the Family Trust to be administered on a different basis.

92 Under the revised proposed arrangement, each Trustee has undertaken not to exercise these powers during the Relevant Period without the consent of the Court, save for distributions of corpus to a Relevant Beneficiary (pursuant to its cl 7 power). In my view, these undertakings, as part of the revised proposed arrangement, are also for the benefit of the underage Beneficiaries and potential Beneficiaries during and beyond the Relevant Period. The effect of the revised undertakings is to preserve the Family Trusts and their assets for the Relevant Period (being around 18 years), save for distribution of corpus to a Relevant Beneficiary, unless Court approval is obtained.

93 This provides a genuine benefit in two ways. The first is the benefit which flows from the underage Beneficiaries and the subset of potential Beneficiaries who are Relevant Beneficiaries being the sole objects of corpus entitlements during the Relevant Period.

94 The second benefit is that, given the limited corpus distributions that can be made and that no revocation or resettlement can take place during the Relevant Period, there is a greater prospect that, at the end of the Relevant Period, there will be a larger pool of assets from which distributions can be made to any Beneficiaries, including a Relevant Beneficiary or any other potential Beneficiary. This is in a context where the revised trustee undertakings also include an express undertaking that, after the Relevant Period, in exercising their discretion in relation to capital or income distributions, each Trustee shall consider all Beneficiaries (other than those whose rights have been extinguished) notwithstanding the substantial weight to be accorded to the succession plan (the **trustee discretion undertaking**).

95 As set out above, my concern at the time of the original proposed arrangement was for the underage children or potential children of Non-Group Managers given that it was only Group Managers and their children who were intended to benefit from the distribution of Group assets under the succession plan. The revised trustee undertakings do not distinguish between the children of Group Managers and Non-Group Managers. This would appear to be because the trustee discretion undertaking is to be made in respect of all Beneficiaries.

96 Nevertheless, I have considered the likelihood that Non-Group Managers will have children after the Relevant Period, whether naturally or by adoption. I have formed the view that the prospect of a natural or adopted child of Non-Group Managers is remote. Peter (who will be over 80 years' old at the end of Relevant Period) deposed in October 2021 that he is no longer able to naturally have children and does not intend to adopt any further children. Cindy (who will be 66 years' old at the end of the Relevant Period) deposed that she does not desire or intend to have further children and there are no circumstances in which she and her husband would contemplate adopting a child. Kaye and Joanne deposed to the same effect. Notwithstanding this evidence, any such child of the Non-Group Managers would become a Beneficiary of each Family Trust, and each Trustee has given the trustee discretion undertaking to consider them as potential objects.

97 Thus, in all these circumstances, I consider that the proviso has been satisfied.

The second stage

98 I consider that the second stage has also been satisfied. This is because I am satisfied that the revised proposed arrangement is, in its nature, a proper and fair one. I refer to my comments at [67] above and reiterate:

- (1) the significant tax and other savings to the business of the Group and the Family Trusts by reason of the revised proposed amendments;
- (2) the revised proposed amendments avoid any risk to the commercial viability of the business of the Group should it have been necessary to distribute the assets of the Family Trusts to the Group Managers absent the revised proposed amendments; and
- (3) the litigation guardian of the underage Beneficiaries and the Contradictor were in favour of the Court approving the original proposed amendments and the revised proposed arrangement.

99 The Group Managers consent to the revised proposed arrangement. The other adult Beneficiaries appear to have consented to the revised proposed arrangement. This is in circumstances where the adult Beneficiaries consented to the original proposed amendments: indeed, at that time, many of the Non-Group Managers and their children deposed that they considered their entitlements under the Family Trusts had been extinguished. Further, all adult Beneficiaries consented to an earlier version of the revised proposed arrangement in about April 2023.

100 Finally, in my view, the revised proposed arrangement strikes a fair and reasonable balance between the succession plan (which has already been implemented by way of distributions to Non-Group Managers) and the interests of the underage Beneficiaries and potential Beneficiaries of the Family Trusts for the reasons set out in relation to the first stage. In particular, I refer to the trustee discretion undertaking. I am conscious that this undertaking is no more than each Trustee's

obligation at law: nevertheless, the trustee discretion undertaking reminds each Trustee of, and emphasises to each Trustee, its obligations at law.

101 Thus, I am content to make orders approving the revised proposed arrangement under s 63A of the *Trustee Act* on behalf of the two underage Beneficiaries and any unborn or other potential beneficiaries and will make orders giving effect to it. In light of the changes brought about by the revised proposed arrangement, which differs from the previous version submitted to the Court in April 2023, it will be for each Trustee to satisfy itself that the consent of each adult Beneficiary has been formally obtained.

102 I will make orders in accordance with the terms of the proposed amended originating motion including that the Contradictor's costs of an incidental to each proceeding be paid from the respective Family Trust on an indemnity basis.

SCHEDULE OF PARTIES

S CI 2015 02020

BETWEEN:

W.E. PICKERING NOMINEES PTY LTD (ACN 007 817 825)
(AS TRUSTEE FOR THE W.E. PICKERING FAMILY TRUST)

First Plaintiff

ROGER STEWART PICKERING

Second Plaintiff

DARYL JOHN PICKERING

Third Plaintiff

JAMES STEWART PICKERING

Fourth Plaintiff

- and -

JACQUELINE ROBYN PICKERING

First Defendant

DAWN MARGARET PICKERING

Second Defendant

ROBYN ELIZABETH PICKERING

Third Defendant

PETER EDWARD PICKERING

Fourth Defendant

CINDY LYNNE PICKERING

Fifth Defendant

NATASHA WHITE

Sixth Defendant

JUSTIN PICKERING

Seventh Defendant

REBECCA PICKERING

Eighth Defendant

EMMA PICKERING

Ninth Defendant

LACHLAN PICKERING

Tenth Defendant

LANA HOSKING

Eleventh Defendant

CHRISTOPHER HOSKING

Twelfth Defendant

TEGHAN PEARSE

Thirteenth Defendant

MYKAELA PICKERING

Fourteenth Defendant

BENJAMIN PICKERING

Fifteenth Defendant

MATHEW PICKERING

Sixteenth Defendant

NICHOLAS JAMES CROSS (by his litigation guardian
Cindy Lynne Cross (nee Pickering))

Seventeenth Defendant

MITCHELL JORDAN CROSS (by his litigation guardian,
Cindy Lynne Cross (nee Pickering))

Eighteenth Defendant

SUZANNE MARY LYTTLETON

Contradictor

S CI 2018 02379

BETWEEN:

G.S. & B.W. PICKERING NOMINEES PTY LTD
(ACN 007 817 834) (AS TRUSTEE FOR THE GEORGE
PICKERING FAMILY TRUST)

First Plaintiff

JAMES STEWART PICKERING

Second Plaintiff

PASQUALINO JOHN MITTIGA

Third Plaintiff

- and -

~~GEORGE PICKERING~~

~~First Defendant~~

KAYE HOLT

Second Defendant

JOANNE PICKERING

Third Defendant

MELISSA HOLT

Fourth Defendant

TIMOTHY HOLT

Fifth Defendant

MICHAEL HOLT

Sixth Defendant

KRISTY HOLT

Seventh Defendant

SAMMYL PICKERING

Eight Defendant

TAILAH PICKERING

Ninth Defendant

BRADLEY PICKERING

Tenth Defendant

MARK PICKERING

Eleventh Defendant

SUZANNE MARY LYTTLETON

Contradictor